CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT,

vs.

PAUL H. DOYAL, ET AL., MEMBERS OF R. THE STATE REVENUE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED MAY 28, 1931

(35,931)

(35,931)

SUPREME COURT OF THE UNITED STATES

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No. 118

FOX FILM CORPORATION, APPELLANT,

vs.

R. C. NORMAN, STATE TAX COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 3, 1931

[fol. 1]

IN SUPERIOR COURT OF FULTON COUNTY

FOX FILM CORPORATION, Plaintiff in Error,

v.

R. C. NORMAN, State Tax Commissioner, Defendant in Error

BILL OF EXCEPTION AND ORDER THEREON—Filed June 11, 1930

GEORGIA,
Fulton County:

Be it remembered, That on the 4th day of June, 1930, there came on to be heard in the Superior Court of Fulton County, Georgia, before the Honorable John D. Humphries, one of the Judges of said Court then and there presiding, the case of Fox Film Corporation v. R. C. Norman, State Tax Commissioner, the same being an application on the part of plaintiff for an injunction against defendant. Said hearing was had pursuant to an order or rule nisi of the court entered upon the filing of the original petition.

Defendant having been served and having filed a demurrer to the petition, and both sides having announced ready, the said application for an injunction was considered upon the pleadings filed, there having been no issues arising upon any traverse of a substantive fact.

After argument of counsel, the court, at the conclusion of the hearing, to wit, on June 4, 1930, did enter an order sustaining defendant's general demurrer to the petition and denying said application for injunction, and did refuse the same.

To the judgment of the court sustaining the general demurrer, denying the application for injunction and refusing the same, plaintiff excepted, and now excepts and assigns the same as error and says that the court erred in not granting said application for an interlocutory injunc-
[fol. 2] tion, and that said judgment is error for the reason that as plaintiff contends, the grant of an injunction was required under law.

To the said judgment of the court sustaining the general demurrer, denying said application for an injunction and refusing the same, plaintiff excepted and now excepts and

assigns the same as error and says that the same was contrary to law because under the law said injunction should have been granted upon each and every ground set forth in plaintiff's original petition, and for the reasons stated in said petition.

Plaintiff, Fox Film Corporation, names itself as plaintiff in error herein and the said R. C. Norman, State Tax Commissioner, as defendant in error.

Plaintiff specifies as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. The original petition filed in office of the clerk of the Superior Court of Fulton County on April 18, 1930, with all entries thereon.

2. The acknowledgment of service of the petition and rule nisi, entered by defendant's attorney on said petition on April 17, 1930.

3. The rule nisi and order of the court entered upon the presentation of said original petition in April 18, 1930.

4. The demurrer of defendant to the petition and all entries thereon.

5. The order of the court entered on the 4th day of June, 1930, sustaining the demurrer and denying and refusing the injunction.

Plaintiff in error comes now on this 11th day of June, 1930, and presents to his Honor, John D. Humphries, who presided in said case, this its bill of exceptions, the same being tendered within twenty days from the date of the order denying said interlocutory injunction and within the [fol. 3] time prescribed by law, and asks that the same be signed and certified according to the statutes in such cases made and provided in order that said case may be carried to the Supreme Court of Georgia and that the errors complained of may be reviewed and corrected by that court.

Sutherland & Tuttle, Joseph B. Brennan, Attorneys for Plaintiff in Error.

P. O. address: Atlanta Trust Company Bldg., Atlanta, Georgia.

I certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Fulton county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be immediately transmitted to the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

This 11th day of June, 1930.

John D. Humphries, Judge Fulton Superior Court.

[fol. 4] [File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 5] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed April 18, 1930

Fox Film Corporation, hereinafter called the plaintiff, brings its petition against R. C. Norman, State Tax Commissioner of Georgia, and shows to this Honorable Court the following facts:

1. Defendant is a citizen of Georgia and resides in the City of Atlanta in Fulton County, Georgia.

2. The plaintiff is a corporation organized and existing under the laws of New York, and engaging within Georgia in the business of licensing copyrighted motion pictures.

3. During the last quarter of the year 1929, to wit, the three months ending December 31, 1929, plaintiff was the owner and proprietor of certain copyrights granted by the United States of America upon motion picture films or productions.

4. As such owner plaintiff had the exclusive right to project and exhibit certain films or productions and to license the same for projection or exhibition.

5. During said three months period ended December 31, 1929, plaintiff granted through its office at Atlanta, Georgia,

to various motion picture exhibitors, licenses under the copyrights of several photoplays owned by plaintiff.

6. During said three months period ended December 31, 1929, plaintiff received from said exhibitors, as royalties under said copyrights, substantial sums, to wit, the sum of $107,543.58, which constituted plaintiff's gross receipts from said copyrights.

7. All of such receipts as referred to in the next preceding paragraph were obtained by plaintiff as distributor from various exhibitors under the provisions of a standard exhibition contract, all of said contracts being similar with [fol. 6] the exception of the times, places, amounts and subject-matter to be shown, the language of the said contracts relating to the granting of such licenses being as follows:

"Second. (a) The distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule.

"Third. The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibition of such photoplays, and for no other purpose.

Fourth. The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous [fol. 7] exhibitor of the positive print thereof.

8. On the 29th day of January, 1930, plaintiff pursuant to the gross Receipts Tax Law of Georgia, being the Act approved August 29, 1929, and set out in Georgia Laws, 1929, page 103, made the return of its gross receipts, as required by said law, on Form 100, which was furnished by defendant as State Tax Commissioner. Said return was a true and correct return of all gross receipts derived by plaintiff from its business done through its Georgia office.

9. Said return showed gross receipts in the sum of $9,982.59, inclusive of the receipts described in the paragraph below.

10. Said return showed that the further sum of $107,543.56, representing royalties from the United States copyrights, referred to above, were received by plaintiff through its Georgia office during the three months period ended December 31, 1929, which sum, however, was claimed by plaintiff to be exempt from taxation under the Georgia Gross Receipts Tax Law, referred to above.

11. Of said sum of $107,543.56, representing royalties from United States copyrights, as described above, the sum of only $24,458.20, represents royalties, paid to plaintiff under the standard form of licensing contracts, described above, by motion picture exhibitors within the State of Georgia.

12. Defendant as State Tax Commissioner of Georgia claims the right to include the said sum of $24,458.20, representing royalties from the United States copyrights above referred to in plaintiff's total gross receipts for the purpose of computing a tax thereon under the provisions of said gross Receipts Tax Law of Georgia, referred to above.

13. Said Georgia Gross Receipts Tax Law, as construed [fol. 8] and applied to provide for the taxation of royalties from United States copyrights is unconstitutional, being in violation of Article 1, Section 8 of the Constitution of the United States, and being in effect a tax by one of the sev-

eral states upon an instrumentality of the United States or the gross income derived therefrom.

14. The only tax due by this plaintiff for the period ended December 31, 1929, is a tax of two mills on each dollar on the sum of $2,482.59, which said amount is the excess of the gross receipts, exclusive of royalties from copyrights, over the quarterly exemption of $7500.00 allowed by law. Plaintiff paid the said tax amounting to $4.98 on the 29th day of January, 1930.

15. Defendant has assessed against plaintiff an additional gross receipts tax in the sum of $48.92 for the three months period ended December 31, 1929, which tax is based upon the "inclusion" by said defendant in plaintiff's taxable gross receipts for said period of the sum of $24,458.20, representing royalties from United States copyrights, received by plaintiff from motion picture exhibitors within Georgia.

16. Defendant has served upon plaintiff notice of said assessment.

17. Defendant has refused to recognize the claim of plaintiff, that said royalties from United States copyrights are exempt from taxation by the State of Georgia.

18. Defendant has threatened and continues to threaten to collect said sum of $48.92 as taxes due under the Gross Receipts Tax Law, referred to above.

19. In including plaintiff's royalties from United States copyrights in plaintiff's taxable gross receipts, as above described, defendant has purported to act under said Gross [fol. 9] Receipts Tax Law of Georgia, referred to in paragraph 8 above, which defendant claims should be construed to provide for the taxation of royalties from United States copyrights.

20. Plaintiff is informed and believes that if it shall pay said tax, it will be without adequate remedy at law under the procedure provided by the laws of Georgia, and in particular the Georgia Gross Receipts Tax Act, referred to above, for the reason that the provisions in said Gross Receipts Tax Act with reference to appeals to the State Tax Board and suit or actions in the superior court and appeals therefrom to the Supreme Court are vague, indefinite and

uncertain; and for the further reason that it is questionable and uncertain whether or not a refund by the State or the Tax Commissioner is constitutionally authorized by said act on account of the failure of the title of said act to cover the subject of refunds: and for the further reason that there is no other provision in the laws of Georgia authorizing suits for the recovery of taxes illegally collected even where paid under protest. Unless defendant is enjoined and restrained from the collection of said taxes, therefore, plaintiff will be without a plain, adequate and complete remedy, and will suffer irreparable injury and damages.

21. In addition to the tax assessed by defendant against plaintiff for the three months period ended December 31, 1929, as described above, defendant has threatened to assess against plaintiff heavy penalties, provided by the Gross Receipts Tax Law. Said penalties are illegal for the reason that the tax upon which the penalties are based are illegal, as set forth in detail above. Plaintiff is informed and believes, however, that if it is forced to pay said penalties the law offers no remedy whatever for their recovery back, and unless defendant is enjoined and re-
[fol. 10] strained from the collection of said penalties, plaintiff will suffer irreparable injury and damages.

22. In addition to the assessment made by defendant against the plaintiff for the three months period ended December 31, 1929, defendant has proposed and threatened, and continues to threaten, to assess and collect from plaintiff a gross receipts tax based upon the inclusion in plaintiff's gross receipts of any income from royalties from United States copyrights which plaintiff may collect through its Georgia office from motion picture exhibitors within Georgia during the period covered by the Georgia Gross Receipts Tax Law, to wit, down to December 31, 1931. Plaintiff has already acquired such additional income from royalties from United States copyrights through its Georgia office, since December 31, 1929; and plaintiff reasonably expects to acquire additional income in large amounts from United States copyrights through its Georgia office, as described above, between now and December 31, 1931. If the law of Georgia provides any remedy at law,

for the recovery of taxes wrongfully and illegally collected, resort to such remedy by plaintiff would involve a multiplicity of suits against this defendant for the reason that a separate cause of action would arise in favor of plaintiff for each three months period, beginning with the period ended December 31, 1929, and running down to December 31, 1931.

23. Said Gross Receipts Tax Act, referred to above, provides that the tax imposed by said act shall constitute a lien upon all the property of the taxpayer so that the outstanding assessment by defendant against plaintiff of taxes based upon the inclusions in plaintiff's taxable gross receipts of royalties from United States copyrights would constitute a cloud upon plaintiff's title to property which it owns in Georgia.

[fol. 11] Wherefore, waiving discovery, plaintiff prays:

1. That this court grant proper decrees temporarily and permanently enjoining and restraining defendant, his successors in office and agents, from proceeding further with the assessment and collection of said threatened tax so assessed, measured as aforesaid by including said gross income from copyrights in plaintiff's taxable gross receipts.

2. For such other and further relief as the court deems proper.

3. Also that process issue requiring defendant to be and appear at the next term of this Honorable Court to answer this complaint.

Southerland & Tuttle, Joseph B. Brennan, Attorneys for Plaintiff.

Duly sworn to by Jack G. Leo. Jurat omitted in printing.

[fol. 12] IN SUPERIOR COURT OF FULTON COUNTY

ORDER TO SHOW CAUSE

The foregoing bill read and considered. The same is sanctioned and ordered filed. Let the defendant be served, and let him show cause, if any he has or can, before me at

Fulton County courthouse, Atlanta, Georgia, on the 26 day of April, 1930, at 9:30 o'clock a. m., or as soon thereafter as counsel can be heard, why the prayers of the bill should not be had and allowed. This 18 day of April, 1930.

Virlyn B. Moore, Judge Superior Court.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

SUMMONS—Filed April 18, 1930

To the Sheriff, or his deputy, of said county, Greeting:

The defendant is hereby required, personally or by attorney to be and appear at the superior court, to be held in and for said county on the first Monday in July, 1930, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall [fol. 13] appertain.

Witness the Honorable John D. Humphries, Judge of said court, this 18 day of April, 1930.

Fred F. Edwards, Deputy Clerk.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed June 4, 1930

Comes now the defendant, R. C. Norman, as State Tax Commissioner, and demurs to the petition in the above stated cause upon the following grounds:

1st. Because no cause of action is set forth.

2nd. Because there is no equity in the petition.

3rd. Because under the facts stated the plaintiff is not entitled to the relief sought.

4th. Because the tax, the levy, and the enforcement of which is sought to be enjoined is not a tax upon an instrumentality of the United States, and the tax is not in violation of the Constitution or laws of the United States.

5th. Because the tax imposed by the act approved August 29, 1929, is not a tax upon copyrights or royalties received from copyright articles or productions, but is an excise or privilege tax upon persons and corporations engaged in businesses and occupations within the State of Georgia, measured by the receipts of such businesses and [fol. 14] occupations at certain rates prescribed in the Act.

6th. Because the excise or privilege tax imposed by the Act approved August 29, 1929, upon persons engaging or continuing in business within the State measured by the receipts of the business engaged in at rates fixed in the Act, does not impose a tax upon instrumentalities of the United States, though income from such instrumentalities may be included in the gross receipts from the business of the person subject to the privilege tax imposed.

7th. Because royalties paid for the use of copyright productions or articles are not instrumentalities of the United States and are not exempted from taxation by the States under the constitution and laws of the United States.

8th. Because the excise tax upon the privilege of engaging or continuing in business within the State of Georgia levied by the Act approved August 29, 1929, is not in violation of the constitution and laws of the United States, the tax imposed being upon the privilege of engaging in business within the State measured by the receipts from the business engaged in. Such tax does not interfere with the exclusive privilege granted by a copyright, such privilege not being taxed by the act and any interference therewith being incidental, indirect and remote.

9th. Because the excise or privilege tax imposed by the Act approved August 29, 1929, does not diminish or effect in any degree the right given by Congress to the owner of a copyright to exclude others from reproducing, making, using or vending any production or article covered by such copyright, nor interfere with the full enjoyment of the privilege and monopoly granted to the owner of such copyright.

[fol. 15] Wherefore defendant prays that these, his grounds of demurrer may be inquired of by the court and that the bill may be dismissed.

Orville A. Park, Defendant's Attorney.

[File endorsement omitted.]

In Superior Court of Fulton County

Order Sustaining Demurrer & Denying Injunction

This cause coming on to be heard upon the rule to show cause why an injunction should not be granted and defendant having demurred to the petition, after argument had:

It is considered and ordered that the demurrer be sustained, the injunction be denied and that the suit be dismissed.

Plaintiff having announced its intention of "suing" out a bill of exceptions to review this order and judgment, it is further ordered that this judgment be suspended until the cause can be reviewed by the Supreme Court, and the final termination of the cause therein.

And it is so ordered, this 4th day of June, 1930.

John D. Humphries, Judge S. C. A. C.

[fol. 16] Clerk's certificate to foregoing paper omitted in printing.

[fol. 17] In Supreme Court of Georgia

Opinion—Decided February 27, 1931

By the Court:

This case coming on for decision by a full bench of six Justices, and they being equally divided in opinion as to whether the court erred in sustaining a demurrer to the petition and in refusing an interlocutory injunction, Russell, C. J., and Atkins and Hill, JJ., being of the opinion that the court erred, and Beck, P. J., and Gilbert and Hines, JJ., being of the opinion that the court did not err, the judgment is affirmed by operation of law.

[fol. 18] IN SUPREME COURT OF GEORGIA

7927

[Title omitted]

JUDGMENT—February 27, 1931

This case came before this court upon a writ of error from the Superior Court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed by operation of law, the court being equally divided in opinion as to whether the court erred in sustaining a demurrer to the petition and refusing an interlocutory injunction, Russell, C. J., and Atkinson and Hill, JJ., being of the opinion that the lower court should be reversed, and Beck, P. J., and Gilbert and Hines, JJ., being of the opinion that the lower court should be affirmed.

[fol. 19] IN SUPREME COURT OF GEORGIA

[Title omitted]

CERTIFICATE—Filed April 17, 1931

This case having been decided by a divided court, the Justices being equally divided in opinion as to whether the Superior Court erred in sustaining a demurrer to the petition and in refusing an interlocutory injunction, and the judgment of the Superior Court having been accordingly affirmed by operation of law, and it appearing that Plaintiff in error intends to file a petition for appeal to the Supreme Court of the United States, it is hereby certified that the sole issues presented to this Court were the question as to whether the Georgia Gross Receipts Tax Act (Laws 1929, p. 103) should be construed to apply to the royalties from United States copyrights, described in the bill of complaint, and the question as to whether said Act as so construed is violative of the Constitution of the United States, in that such application of said Act would result in an undue burden upon Federal instrumentalities, and in that it would unduly interfere with the power conferred upon the Federal Government by Article I, Section 8, Clause 8 of the Constitution of the United States. It is further certified that these issues were considered by this court and that the decision and judgment of this court rendered in this

case on February 27, 1931, necessarily involved a holding that said Act should be construed to apply to the receipts in question, and that said Act as thus construed is valid as against the constitutional objections mentioned.

[fols. 20 & 20½] This certificate is given for use in the prosecution of said appeal to the United States Supreme Court, in support of the jurisdiction of said Court, and shall be incorporated in the transcript of the record to be furnished by the Clerk of this Court.

This 16th day of April, 1931.

Richard B. Russell, Chief Justice of the Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 21] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed May 4, 1931

Petition for Appeal

Considering itself aggrieved by the final decision of the Supreme Court of the State of Georgia in the above entitled cause, the Plaintiff in Error therein Fox Film Corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Fox Film Corporation assigns the following errors in the record and proceedings in the said cause:

1. The Supreme Court of the State of Georgia erred in upholding and sustaining the validity of the Georgia Gross Receipts Tax Act, (Ga. Laws 1929, p. 103), as construed to apply to the royalties from United States copyrights described in the bill of complaint, in that said Act as so construed and applied imposes an undue and a direct burden upon federal instrumentalities, to-wit, copyrights granted by the United States, and unduly and directly interferes with the power conferred upon the Federal Government by [fol. 22] Article 1, Section 8, Clause 8 of the Constitution of the United States.

2. In said suit there was drawn in question the validity of the statute of the State of Georgia, commonly called the Georgia Gross Receipts Tax Act, approved August 29, 1929, (Ga. Laws 1929, p. 103), on the ground that it was repugnant to the Constitution and Laws of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said statute, which decision is hereby assigned as error.

Prayer for Reversal

For which errors Fox Film Corporation prays that said judgment of the Supreme Court of the State of Georgia, dated February 27, 1931, in the above entitled cause, be reversed and a judgment rendered in favor of the said Fox Film Corporation, and for costs.

W. A. Sutherland, Joseph B. Brennan, Counsel for Appellant.

[File endorsement omitted.]

[fol. 23] In Supreme Court of Georgia

[Title omitted]

Order Allowing Appeal—Filed May 4, 1931

Appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Georgia on the 27th day of February, 1931, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United

States, so that he shall have the same in said Court within thirty (30) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred ($500.00) Dollars.

Dated May 4, 1931.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fols. 24-28] Bond on appeal for $500, approved and filed May 4, 1931, omitted in printing.

[fol. 29] Citation, in usual form, showing service on R. C. Norman, omitted in printing.

[fol. 30] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 4, 1931

To the clerk of the above court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. All the original record filed in the Supreme Court of Georgia.

2. The opinion and judgment of the Supreme Court of Georgia rendered on February 27, 1931.

3. Certificate of Richard B. Russell, Chief Justice of the Supreme Court of Georgia, dated April 16, 1931, and filed April 17, 1931.

4. The petition for apepal, assignment of errors and prayer for reversal.

5. The order allowing appeal and the appeal bond.

6. The citation on appeal and acknowledgment of service thereon.

7. This præcipe with acknowledgment of service thereon.

8. Certificate of the clerk to the correctness of the record as to præcipe.

W. A. Sutherland, Joseph B. Brennan, Counsel for Appellant.

[fol. 31] Due and legal service of the above præcipe is hereby accepted and acknowledged, and all other and further service is hereby waived.

This 4th day of May, 1931.

R. C. Norman, O. A. Park, J. A. Smith, Counsel for Appellee.

[File endorsement omitted.]

[fols. 32 & 32½] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 33-35] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 28, 1931

Comes now the appellant and adopts his assignments of error as his statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated May 4th, 1931.

W. A. Sutherland, Joseph B. Brennan, Counsel for Appellant.

Due and sufficient service of the above statement of points to be relied upon and designation of the parts of record to be printed in the above entitled case is hereby accepted.

R. C. Norman, O. A. Park, J. A. Smith, Counsel for Appellee.

Endorsed on cover: File No. 35,931. Georgia Supreme Court. Term No. 18. Fox Film Corporation, appellant, vs. R. C. Norman, State Tax Commissioner. Filed May 28, 1931. File No. 35,931.

FILE COPY

MAY 28 193

Supreme Court of the United States

OCTOBER TERM, 1930

No. ~~1000~~ 118

FOX FILM CORPORATION,
Appellant,

v.

R. C. NORMAN,
STATE TAX COMMISSIONER,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

STATEMENT AS TO JURISDICTION ON APPEAL

W. A. SUTHERLAND,
ELBERT P. TUTTLE,
JOSEPH B. BRENNAN,
Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1930

No. 1

FOX FILM CORPORATION,
Appellant,

v.

R. C. NORMAN,
STATE TAX COMMISSIONER,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

Pursuant to Supreme Court Rule 12, par. 1, Fox Film Corporation, the above appellant, files this its statement showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

A

The statute believed to sustain appellate jurisdiction is Sec. 237(a) of the Judicial Code as amended (Sec. 344 of Title 28 of the United States Code),

which provides that "a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, * * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, Treaties, or Laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error." See also Act of Congress of January 31, 1928, c. 14, Sec. 1, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466 [Secs. 861(a) and 861(b) of Title 28 of the United States Code].

B

The judgment appealed from was entered on the 27th day of February, 1931, as appears from page 18 of the certified transcript of record herein.

The application for an appeal was presented on the 4th day of May, 1931, as appears from page 23 of the certified transcript of record herein.

C

The appeal herein is from a judgment of the Supreme Court of Georgia affirming a judgment of the Superior Court of Fulton County wherein a general demurrer to a bill of complaint was sustained and the bill was dismissed. In said bill of complaint an injunction was sought by appellant herein against the collection by the defendant of a tax under the Georgia Gross Receipts Tax Act (Georgia Laws 1929 p. 103), which tax was based upon the inclusion of royalties from United States copyrights in appel-

lant's taxable gross receipts, as appears from pages 5, 13, 15, and 18 of the certified transcript of record herein. In said bill of complaint it was alleged that "said Georgia Gross Receipts Tax Law, as construed and applied to provide for the taxation of royalties from United States copyrights is unconstitutional, being in violation of Article I, Sec. 8 of the Constitution of the United States, and being in effect a tax by one of the several States upon an instrumentality of the United States or the gross income derived therefrom." In the Supreme Court of Georgia there was drawn in question the validity of said Georgia Gross Receipts Tax Act, being a statute of the State of Georgia, on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision of the Supreme Court of Georgia was in favor of its validity, as appears more clearly from the certificate of the Chief Justice of the Supreme Court of Georgia at page 19 of the certified transcript of record herein.†

D

The cases believed to sustain the jurisdiction are as follows:

NATURE OF THE QUESTION INVOLVED

Macallen Company v. Massachusetts, 279 U. S. 620;

Long v. Rockwood, 277 U. S. 142;

Northwestern Mutual Life Insurance Company v. Wisconsin, 275 U. S. 136.

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† The Justices of the Supreme Court of Georgia were equally divided and the Court rendered no opinion setting forth the grounds or reasons for its decision.

CERTIFICATE OF STATE CHIEF JUSTICE

Gulf & Ship Island R. Co. v. Hewes, 183 U. S. 66;
Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179;
Hartman v. Greenhow, 102 U. S. 672;
Whitney v. California, 274 U. S. 357;
Johnson v. Risk, 137 U. S. 300.

DECISION BY DIVIDED COURT

Hartman v. Greenhow, supra;
Lessieur et al. v. Price, 12 How. 59.

Dated May 19, 1931.

Respectfully submitted,

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Service of a copy of the above statement is hereby admitted.

This day of May, 1931.

Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT,

v.

PAUL H. DOYAL, STATE TAX COMMISSIONER.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLANT

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FOX FILM CORPORATION, APPELLANT,

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PAUL H. DOYAL, STATE TAX COMMISSIONER.

BRIEF FOR APPELLANT

THE OPINIONS OF THE COURTS BELOW

The only opinion rendered by either of the Courts below was the *per curiam* opinion, which the Supreme Court of Georgia handed down on February 27, 1931, stating that the Justices of that Court were equally divided, and that therefore the judgment of the Superior Court was affirmed by operation of law (R. 11). This opinion is reported at 172 Ga. 403.

STATEMENT OF THE CASE

Appellant brought its bill of complaint in the Superior Court of Fulton County, Georgia, against Appellee's predecessor in office, R. C. Norman, State Tax Commissioner, to enjoin the collection of a tax under the Georgia Gross Receipts Tax Act, Georgia Laws 1929, page 103, in so far as such tax was based upon the inclusion in Appellant's taxable gross receipts of royalties from United States copyrights (R. 3). The bill alleges that Appellant during the times in question was the owner and

proprietor of certain copyrights granted by the United States upon motion picture films or productions. It is alleged that as such owner Appellant had the exclusive right to project and exhibit certain films or productions, and to license the same for projection or exhibition (R. 3). The bill alleges further that Appellant granted to various motion picture exhibitors licenses under the copyrights of several photoplays owned by Appellant, whereby the licensees were authorized to exhibit such photoplays under specified conditions (R. 4). The royalties received by Appellant under such licenses are the sums which the State Tax Commissioner claims the right to tax under the Georgia Gross Receipts Tax Act (R. 5). The bill of complaint alleges that the Georgia Gross Receipts Tax Act as thus construed and applied to provide for the taxation of royalties from United States copyrights is unconstitutional, being in violation of Article 1, Section 8, of the Constitution of the United States, and being in effect a tax by one of the several states upon an instrumentality of the United States or the gross income derived therefrom (R. 5, 6). The bill prays for proper decrees temporarily and permanently enjoining and restraining the State Tax Commissioner, his successors in office and agents, from proceeding further with the assessment and collection of the tax (R. 8).

The tax imposed by the Act in question is described in its title as "a tax upon the privilege of engaging in certain occupations," and as "a tax upon certain business and commercial transactions and enterprises." The Georgia Gross Receipts Tax Act provides in separate sections for the taxation of manufacturers, persons engaged in the business of selling tangible property, persons engaged in the business of operating railroads, electric light and power companies etc., persons engaged in the business of operating theaters, opera houses, moving picture shows etc. Then follows Sections 7 of the Act, under which Section the State Tax Commissioner claims the right to tax Appellant on the basis of its royalties from copyrights. Section 7 provides as follows:

"Sec. 7. Be it further enacted that upon every person engaged or continuing within this State in any and every business not included in the preceding sections there is levied and shall be collected a tax equal to two mills on the dollar of the gross receipts of any such business.

"There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the Constitution of the United States of America."

Section 8 of the Act provides for an annual exemption of $30,000.00 of the gross receipts of persons subject to the tax.

The Defendant filed a general demurrer in the trial court (R. 9), and upon hearing the same was sustained and the bill of complaint was dismissed (R. 11).

The case was taken to the Supreme Court of Georgia upon writ of error (R. 1-3). The Justices of the Supreme Court were equally divided in opinion as to whether the trial court erred in sustaining the demurrer to the petition and in refusing an interlocutory injunction, and the judgment of the trial court was thereby affirmed by operation of law (R. 11, 12). The Chief Justice of the Supreme Court of Georgia handed down a certificate to the effect that the sole issues presented to that Court were the question as to whether the Georgia Gross Receipts Tax Act, supra, should be construed to apply to royalties from United States copyrights, and whether said Act as so construed is violative of the Constitution of the United States (R. 12). The certificate further certifies that these issues were considered by the Supreme Court of Georgia and that the decision and judgment of that Court necessarily involved a holding that the Act should be construed to apply to the receipts in question, and that the Act as thus construed is valid as against the constitutional objections mentioned (R. 12, 13).

An order allowing an appeal to this Court was signed on May 4, 1931 (R. 14, 15). This Court noted probable jurisdiction on October 19, 1931. On November 23, 1931 this Court signed an order substituting Paul H. Doyal, State Tax Commissioner, as Appellee in place of R. C. Norman, resigned.

SPECIFICATION OF ERRORS

1. The Supreme Court of Georgia erred in upholding and sustaining the validity of the Georgia Gross Receipts Tax Act (Georgia Laws 1929, p. 103), as construed to apply to the royalties from United States copyrights described in the bill of complaint, in that said Act as so construed and applied imposes an undue and a direct burden upon Federal instrumentalities, to-wit, copyrights granted by the United States, and unduly and directly interferes with the power conferred upon the Federal Government by Article 1, Section 8, Clause 8, of the Constitution of the United States (R. 13).

2. In said suit there was drawn in question the validity of the statute of the State of Georgia, commonly called the Georgia Gross Receipts Tax Act, approved August 29, 1929 (Georgia Laws 1929, p. 103), on the ground that it was repugnant to the Constitution and Laws of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said statute, which decision is hereby specified as error (R. 14).

ARGUMENT

Summary of Argument

Appellant will take the position that United States copyrights are Federal instrumentalities, and that the royalties derived therefrom are not taxable by the States. This principle has only recently been affirmed by this Court in the case of *Long v. Rockwood*, 277 U. S. 142 (1928), involving royalties from patents.[1] Appellant will then urge that a State may not require income or royalties from Federal instrumentalities to be included in the gross receipts forming the measure of a general occupation or privilege tax, which principle was recently affirmed by this Court in the case of *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U. S. 136 (1927). Even if United States copyrights are to be treated differently from other Federal instrumentalities for tax purposes—which Appellant, of course, does not concede—Appellant will urge further that royalties from United States copyrights must in any event be given no less immunity than receipts from interstate commerce in the application of State gross receipts or occupational taxes. In support of this view Appellant will show that this Court holds receipts from interstate and foreign commerce subject to a State net income tax, while denying to States the right to impose a net income tax on royalties from United States copyrights. Cf. *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918) and *Long v. Rockwood*, supra. Appellant will then point out that clearly the Georgia Gross Receipts Tax Act could not apply to receipts from interstate or foreign commerce. *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917); *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments*, 280 U. S. 338 (1930).

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[1]The decision of this Court in the case of Long v. Rockwood has been followed by the Supreme Courts of Tennessee and North Carolina. Quicksafe Mfg. Corp. v. Graham, Comptroller, 161 Tenn. 46, 29 S. W. (2d) 253 (1930); Maxwell v. Chemical Const. Co., 200 N. C. 500, 157 S. E. 606 (1931).

I

Copyrights Granted by the United States are Federal Instrumentalities and the Royalties Derived Therefrom are not Taxable by the States.

In the case of *Long v. Rockwood*, supra, this Court considered the question whether the State of Massachusetts could impose a *net income tax* on royalties received by one of her citizens for the use of patents issued to him by the United States. The Supreme Judicial Court of Massachusetts had held that such an imposition would amount to a tax upon the patent right itself and was prohibited by the Federal Constitution. The case came before this Court on writ of certiorari and the decision of the Massachusetts Court was affirmed. The reasoning of this Court by which it arrived at its decision is expressed in the following language from the opinion of the Court, written by Mr. Justice McReynolds (277 U. S. at 147):

> "The power to exclude others granted by the United States to the patentee subserves a definite public purpose —to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And, the settled doctrine is that *such instrumentalities* may not be taxed by the States." (Italics ours.)

There is no basis whatever for urging that any distinction is to be drawn between patents and copyrights, and the royalties derived therefrom, in so far as the present question is concerned. Both the copyright and the patent powers are conferred upon Congress by the Constitution in exactly the same language:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Const., Art 1, Sec. 8, Clause 8.

In the case of *Educational Films Corporation v. Ward*, 282 U. S. 379 (1931), which involved the question whether royalties from copyrights could be included in the measure of the New York corporate franchise tax on net income, it was not suggested that copyrights are to be treated differently from patents with regard to State taxation. The District Court in that case expressly said that since *Long v. Rockwood*, supra, "it cannot be thought that a State may tax directly income from patents or copyrights." 41 F. (2d) 395, 396. The opinion of this Court in that case did not throw the slightest doubt upon the applicability of the principle of *Long v. Rockwood* to royalties from copyrights. In his dissenting opinion, Mr. Justice Sutherland expressly relied upon the proposition that copyrights are instrumentalities of the Federal Government and as such are free from State taxation.

II.

A State May not Tax Income from Federal Instrumentalities Under an Occupation or Privilege Tax Measured by Gross Receipts.

It is urged as a specific ground of the demurrer in this case that the State of Georgia may impose an excise tax upon the privilege of engaging or continuing in business within the State, although such tax is measured by the gross receipts of said business which include royalties from United States copyrights. Appellee's contention is that the so-called gross receipts tax is not a tax on gross receipts, but is simply measured by the amount of gross receipts.[2] Appellee urges that such receipts,

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[2]No importance is attached by Appellee to the words "equal to" in the Georgia Gross Receipts Tax Act. That such words can have no significance is clear from the language of Mr. Justice Holmes in Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, 227 (1908):

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself."

while not themselves taxable, may nevertheless be taken as the measure of tax on the privilege of earning them (R. 10). The contention which Appellee here makes has been answered conclusively by this Court in a fairly recent case, in which the decision was unanimous:

Northwestern Mutual Life Ins. Co. v. Wisconsin, supra.

In that case the Court had before it a Wisconsin statute which provided, with certain exceptions not here material:

> "Every company . . . transacting the business of life insurance within this state . . . shall . . . pay . . . as an annual license fee for transacting such business . . . three per centum of its gross income from all sources . . ."

The plaintiff sued to recover a tax collected under this Act in so far as said tax was based upon income from United States bonds. Although the tax was stated by the Legislature to be a license fee for transacting the business of life insurance in Wisconsin, it was held that the statute was invalid in so far as it undertook to impose a charge of three per centum upon every dollar of interest received by the company from United States bonds. During the course of its opinion, this Court said (275 U. S. at 140):

> "Accordingly, if the challenged Act, *whatever called*, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void." (Italics ours.)

And in a number of other cases involving receipts from interstate or foreign commerce this Court has held that a State tax is void, although it is called an occupational or license tax, where it is measured by gross receipts from such commerce.

Crew Levick Co. v. Pennsylvania, supra;

New Jersey Bell Telephone Co. v. State Board, supra.

In the *Crew Levick* case, supra, the Act provided as follows:

"Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually."

Although the tax in that case was declared by the statute to be a license tax, this Court held, in a unanimous decision, that it was unconstitutional in so far as it was measured by gross receipts from foreign commerce.

A distinction should be drawn here between an excise tax which is measured by gross receipts and one which is measured by net receipts from a Federal instrumentality. This Court recently held that royalties from United States copyrights may be included in the *net income* which is the measure of the New York Corporate Franchise Tax. *Educational Films Corporation v. Ward*, supra. In that case this Court pointed out that it was following the decision in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 162 et seq. (1911), which upheld a Federal tax levied upon a corporate franchise, which tax was measured by the entire corporate *net income*, including income from tax exempt municipal bonds.[3]

But Mr. Justice Stone, who wrote the opinion of the Court in the *Educational Films Corporation* case, has clearly recognized and does not question the distinction between an excise tax measured by gross income and an excise tax measured by net income. In his dissenting opinion in *Macallen Co. v. Massachusetts*, 279 U. S. 620, 635 (1929), Mr. Justice Stone said:

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[3]It should be noticed that both the Educational Films Corporation case and Flint v. Stone Tracy Co. involved corporate franchise taxes, rather than general occupation taxes such as the Georgia Gross Receipts Tax. In upholding the tax in the Educational Films Corporation case the three judge district court distinguished the case of Panhandle Oil Co. v. Mississippi 277 U. S. 218 (1928) on the ground that the privilege tax held void in that case was not a corporate franchise tax. Educational Films Corporation v. Ward, 41 F. (2d) 395, 397 (S. D. N. Y. 1930).

"The tax is not measured by gross income as in Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136, where the validity of an excise measured by net income including that from tax exempt securities of the United States was recognized. The distinction between net income and gross as the measure of a tax is well established. Peck & Co. v. Lowe, 247 U. S. 165; compare Crew Levick Co. v. Pennsylvania, 245 U. S. 292; United States Glue Co. v. Oak Creek, 247 U. S. 321, 328. Being on net income, the tax does not vary in exact proportion to the gross income from the tax exempt securities included in the aggregate."

And Mr. Justice Brandeis, who was also with the majority in the *Educational Films Corporation* case, recognized the same distinction in his dissenting opinion in *National Life Ins. Co. v. United States*, 277 U. S. 508 (1928). This is clear from the following excerpts from his opinion (277 U. S. at 522, 527, 532):

"Ever since Corporation Tax Act, August 5, 1909, c. 6, Sec. 38, 36 Stat. 11, 112, the United States has laid upon life insurance companies a *special excise tax measured by net income*. . . .

"As the tax imposed by the Act of 1921 is on net income, I should have supposed that it was settled by Flint v. Stone Tracy Co., 220 U. S. 107, 147, 162, that the inclusion in the computation of the interest on tax-exempt bonds . . . would not have rendered the tax objectionable . . .

"I find nothing in the cases cited by the petitioner which lends support to the view that its rights have been violated. Directly to tax the gross income from securities amounts, of course, to taxing the securities themselves. Northwestern Mut. L. Ins. Co. v. Wisconsin, 275 U. S. 136." (Italics ours.)

And finally it must be remembered that the proposition that a State tax, although an excise or privilege tax, is void if

measured by gross receipts which include income from Federal instrumentalities, is supported by *the unanimous decision of this Court* in the case of *Northwestern Mutual Life Ins. Co. v. Wisconsin*, supra. The opinion in this case was written by Mr. Justice McReynolds, who also was with the majority in the *Educational Films Corporation* case.

III

At Least Royalties from Copyrights are no Less Immune from State Taxation than Receipts from Interstate Commerce, and It Is Clear that Receipts from Interstate Commerce Cannot Validly Be Taxed Under the Georgia Gross Receipts Tax Act.

Since *Gillespie v. Oklahoma*, 257 U. S. 501 (1922), it would seem clear that the income from Federal instrumentalities has been placed farther from the reach of State taxation than receipts from interstate or foreign commerce. In that case it appeared that an Oklahoma statute made every person of the State liable to a tax upon his entire *net income* arising from all sources. Oklahoma sought to hold the defendant in that action liable for taxes upon the net income derived by him as lessee of certain restricted Indian oil lands. This Court, speaking through Mr. Justice Holmes, held that the tax was invalid as thus applied since the lessee was "an instrumentality used by the United States in carrying out duties to the Indians that it had assumed." During the course of the opinion of the Court, Mr. Justice Holmes said 257 U. S. at 505):

> "The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S. 628; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 616. The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. Wil-

liams v. Talladega, 226 U. S. 404, 416, 417, 419; Johnson v. Maryland, 254 U. S. 51, 55."

This Court has given royalties from patents more immunity than receipts from interstate commerce with regard to the taxing power of the States. Thus it has been held that receipts from interstate commerce may be included in the computation of net income subject to a State net income tax. *United States Glue Co. v. Oak Creek*, supra. On the other hand, it was held in *Long v. Rockwood* that a State net income tax could not validly apply to royalties from patents granted by the United States.

In view of the holdings in the two cases just cited, it cannot be supposed that a gross receipts tax may validly apply to royalties from copyrights if it cannot apply to receipts from interstate commerce. And it is clear from the authorities cited below that the Georgia Gross Receipts Tax Act could not validly apply to receipts from interstate commerce.

If Section 7 of the Georgia Gross Receipts Tax Act, under which the tax here in question is claimed, should be properly construed to apply to receipts from interstate or foreign commerce, it would clearly be unconstitutional under the decisions of this Court. It has long been held that gross receipts from interstate commerce are not as such taxable by the States.

Fargo v. Michigan, 121 U. S. 230 (1887);

Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887);

Meyer v. Wells, Fargo & Co., 223 U. S. 298 (1912).

It is true that *net receipts* from interstate commerce may, along with other net income, be subjected to a State net income tax. Although this does in a sense burden interstate commerce, this Court has held that it imposes only a permissible burden. The essential difference between a net and a gross income tax is clearly pointed out in the opinion of this Court in *United States Glue Co. v. Oak Creek*, supra, 247 U. S. at 328-329.

In none of these cases, whether involving a net income tax or a gross income tax, has the Court based its decision upon or placed any reliance upon the smallness or excessiveness of the rate. Net income taxes under the war income and excess profits tax acts, involving extremely high rates on net income, have been upheld as applied to persons engaged in the export trade. *Barclay & Co., Inc., v. Edwards*, 267 U. S. 442 (1924). On the other hand, the gross income tax held invalid in the *Crew Levick* case, supra, was only three dollars plus one-half mill on each dollar of volume. The tax under the Georgia Gross Receipts Tax Act is two mills on each dollar of volume above the thirty thousand dollar annual exemption.

It is clear from authorities already cited that a State tax on gross receipts from interstate or foreign commerce is not saved from constitutional objections because it is in the form of a license or occupational tax measured by such gross receipts.

Crew Levick Co. v. Pennsylvania, supra;

New Jersey Bell Telephone Co. v. State Board, supra.

The taxing statute which was held invalid in the *Crew Levick* case is quoted at page 9, supra.

The Act involved in the *New Jersey Bell Telephone Co.* case was declared by its title to be "for the taxation of all the property and franchises of persons . . . using or occupying public streets, highways, roads or other public places." The Act provided that the tax should be upon such proportion of the gross receipts as the length of line in the streets bears to the length of the whole line. The Act further provided that "the franchise tax shall be in lieu of all other franchise taxes assessed against such taxpayers and their property."

The State Court held that the tax was one on property, "earnings being taken merely as a measure of the value of the franchise of the prosecutor." This Court held that the tax was not a tax on property, nor in substitution for, nor in lieu of, a

property tax, and that therefore the Act imposing the tax was unconstitutional as applied to the gross receipts from interstate and foreign commerce.

The following language from the opinion of this Court in the *New Jersey Bell Telephone Co.* case, 280 U. S. at 346, is applicable to the Georgia Gross Receipts Tax Act as applied to interstate commerce:

> "It is elementary that a State may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a *State may not* tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or *impose a license fee* or other burden *upon the occupation or the privilege of carrying on such commerce*, whatever may be the instrumentalities or means employed to that end. (Cases cited) . . . *This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon.*" (Italics ours.)

In the dissenting opinion of Mr. Justice Holmes in the *New Jersey Bell Telephone Co.* case it was urged that the tax should be sustained as a commutation tax, being "in lieu of all other taxes on intangible property." No question was raised in the dissenting opinion as to the soundness of the principle underlying the *Crew Levick* case, which was decided by a unanimous Court, including Mr. Justice Holmes.

Of course it cannot be suggested that the Georgia Gross Receipts Tax Act might be sustained as a commutation tax.[4] The Georgia Gross Receipts Tax Act does not purport to levy a tax in lieu of or in substitution for a tax on property. On the con-

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[4]Cf. Meyer v. Wells, Fargo & Co., supra, and United States Express Co. v. Minnesota, 223 U. S. 335 (1912), decided on the same day.

trary, the tax by the terms of the Act is described as a privilege, occupational, or license tax. It is not even in lieu of other license taxes. Section 20 of the Act provides:

> "Sec. 20. That the tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder."

It is clear therefore that under the decisions of this Court the Georgia Gross Receipts Tax Act would be invalid as applied to receipts from interstate commerce. And since royalties from patents and copyrights are given a greater degree of immunity from State taxation than receipts from interstate commerce, the Georgia Gross Receipts Tax Act must clearly be held invalid as applied to such royalties.

CONCLUSION

In conclusion it is submitted that under the decisions of this Court in the cases of *Long v. Rockwood* and *Northwestern Mutual Life Ins. Co. v. Wisconsin* the Georgia Gross Receipts Tax Act cannot validly apply to royalties from United States copyrights. The case of *Educational Films Corporation v. Ward* did not in any way question the authority of these two cases. In the *Educational Films Corporation* case this Court merely reaffirmed the principle underlying *Flint v. Stone Tracy Co.* These last two cases involved corporate franchise taxes which were measured by *net income*. In the *Educational Films Corporation* case the measure of the franchise tax imposed by New York for any year was the *net income* of the corporation for the preceding year. An attempt is being made in the case at bar to impose a State *gross receipts tax*, in the form of a general occupational tax, directly upon royalties from United States copyrights. Such an act is clearly invalid on the authority of *Long v. Rockwood* and *Northwestern Mutual Life Ins Co. v. Wisconsin*. It would just as clearly be held invalid upon the authority of *Crew Levick*

Co. v. Pennsylvania and *New Jersey Bell Telephone Co. v. State Board*, even if royalties from United States copyrights were in no better position than income from interstate commerce. It is submitted that the Supreme Court of Georgia has disregarded or ignored the applicable decisions of this Court, and that its judgment should be reversed.

Respectfully submitted,

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JAN 9

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT

v.

PAUL H. DOYAL, STATE TAX COMMISSIONER, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT

v.

PAUL H. DOYAL, STATE TAX COMMISSIONER, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

No question of procedure is raised in this case. It is conceded that if royalties on copyrighted motion picture films cannot lawfully be included in gross receipts by which the occupation tax is measured under the Georgia statute, appellant is entitled to an injunction to prevent the State Tax Commissioner from collecting or attempting to collect the tax. On the other hand, if such royalties may lawfully be included, there was no error in refusing the injunction and dismissing the petition.

The principal business of appellant is the furnishing of motion picture films to exhibitors in Georgia and other states for the purpose of exhibition in motion picture houses controlled by them. Most of these are copyrighted and exhibitors pay a royalty to

appellant for the privilege of exhibiting them. (R. p. 3). Appellant contends that these royalties should be excluded from its gross receipts in estimating the tax imposed upon it under the Georgia excise tax act approved August 29, 1929, (Georgia Laws 1929, p. 103), the material portions of which are printed in the margin.* It was held by the trial court, in effect, that these royalties should be included in the plaintiff's gross receipts by which the tax is measured under the act. (R. p. 117). The Supreme Court of Georgia affirmed the decision by a divided court in a per curiam opinion. (R. p. 11). *Fox Film Corporation v. Norman,* 172 Ga. 403. From this judgment the appeal is entered. This is the sole question for decision.

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*Title: "An Act to provide for the raising of public revenue by a tax upon the privilege of engaging in certain occupations and by a tax upon certain business and commercial transactions and enterprises; to provide for the ascertainment and assessment and collection of such tax; *****" etc.

"Sec. 1. *****The term 'gross receipts' means the value proceeding or accruing from the sale of tangible property, (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments, however designated, and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses. The term 'business' as used in this Act shall include all activities engaged in or caused to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, and not excepting sub-activities, producing

BRIEF OF THE ARGUMENT

I

THE IMMUNITY OF FEDERAL INSTRUMENTALITIES FROM STATE TAXATION MUST BE GIVEN SUCH A PRACTICAL CONSTRUCTION AS WILL NOT UNDULY RESTRICT THE POWER OF THE STATE GOVERNMENT IMPOSING THE TAX.

Since *McCulloch v. Maryland,* (1819) 4 *Wheat.* 316, 4 *L. ed.* 579 and *Collector v. Day,* (1871) 11 *Wall.* 113, 20 *L. ed.* 122 there can be no question that the "instrumentalities" of the United States may not be taxed by the states and, conversely, that those of the states are not subject to tax by the federal government. The obvious reason is that to tax such "instrumentalities" interferes with government, national or state, in the exercise of those functions which devolve upon it. "The power to tax is the power to destroy," and under our dual system of government neither nation nor state can destroy the instrumentalities of the other or interfere with the other in the carrying out of its governmental functions.

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marketable commodities used or consumed in the main business activities, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.*****"

"Sec. 2. ******from and after the first day of October, one thousand nine hundred twenty-nine, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values and/or gross receipts, as the case may be, as follows:

"Sec. 3. ********upon every person engaging or continuing within this state in the business of man-

While this is true, and we have no disposition to question the long established rule, but, on the contrary, recognize its propriety, indeed its necessity, we beg to suggest that there should be no extension of the meaning of the term "instrumentalities". At this time, when the government, through bond issues and treasury certificates, is borrowing money in amounts undreamed of when *McCulloch v. Maryland*, was decided; when the states and their subdivisions, to meet the demands upon them, are issuing vast quantities of tax exempt secureties; when officeholders, state and federal, have multiplied until one person in every ten is a government employee and supported by money contributed by the people in the form of taxes; when the functions of government, national, state, and local, have been broadened and multiplied and are constantly being extended; when a considerable part of the business of the country consists in the manufacture, sale, and utilization in one form or another of patented and copyrighted articles and formulae, the exemption of governmental instrumentalities, unless

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ufacturing, compounding or preparing for sale, profit or use any article, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), a tax of one-half of one mill on the dollar thereof. The measure of this tax is the value of the entire product manufactured, compounded, or prepared for sale, profit or use in this state, regardless of the place of sale or the fact that deliveries may be made to points outside the state." (With certain provisions and exceptions not material.) "In de-

restricted, will seriously embarrass the respective governments in the collection of their revenues. Indeed this exemption has already become so serious that it has been urged in some quarters that the Constitution should be so amended as to permit the taxation of these instrumentalities.

There is another important reason why the exemption from taxation accorded to instrumentalities of the government should not be extended. With the increasing demands upon the state governments it has been found necessary to adopt different methods of taxation from those which obtained a half century ago, not only for the purpose of raising additional revenue required, but also more equitably to distribute the tax burden and to conform the methods of taxation to changed conditions. An extension of the principle of exemption of federal instrumentalities will greatly hamper the states in the employment of those just and equitable means of taxation, will compel them to adopt other methods or retain those formerly employed but which are no longer consonant with

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termining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between buyer and seller is such that the gross receipts from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as near as possible to the gross proceeds from the sale of similar products of like quality or character by the other taxpayers where no common interest exists between the buyer and the seller, but otherwise under similar circumstances and conditions.

"Sec. 4. ***upon every person engaging or con-

present conditions, and thus will cause inequalities in the tax burden and will relieve individuals and corporations, who are in no real sense part of the governmental machinery and not entitled to protection as such, from the just burden of government.

The propriety of limiting the exemption of instrumentalities to those necessary to enable the government to carry on its essential governmental functions has long been recognized by this Court. Indeed, in *McCulloch v. Maryland*, it was held that the principle did not extend to the tax paid on the real property of the Bank of the United States in common with other real property, nor to a tax imposed on the proprietary interest which the citizens of the state held in the institution in common with other property of the same description.

More than fifty years ago, in the *Pacific Railroad* cases, it was established that, "No constitutional implication prohibited a state tax upon the property of an agent of the government merely because it is the property of such agent."

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tinuing within this state in the business of selling any tangible property whatsoever, real or personal, there is likewise hereby levied, and shall be collected, a tax equivalent to two mills on the dollar of the gross receipts of the business.******

"Sec. 5. ***upon every person engaging or continuing within this state in the following businesses there shall be levied and collected on account of each of the businesses engaged in, taxes at the rate of three mills on the dollar upon the gross receipts of said business, towit: Steam railroads****" and other enumerated public utilities.

"Sec. 6. **** upon every person engaging or continuing within this state in the business of operat-

Union Pac. R. Co. v. Peniston, (1873), 18 *Wall.* 5, 21 *L. ed.* 787.
Thompson v. Union Pac. R. Co., (1870), 9 *Wall.* 579, 19 *L. ed.* 792.

The Court, speaking through Mr. Justice Strong, in the *Peniston case*, said:

> "But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they ever must be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitu-

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ing a theater" and other places of amusement "the tax shall be three mills on the dollar upon the gross receipts of any such business.

"Sec. 7. **** upon every person engaged or continuing within this State in any and every business not included in the preceding sections there is levied and shall be collected a tax equal to two mills on the dollar of the gross receipts of any such business.

"There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the constitution of the United States of America.

tion must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

The limitation of the exemption is to be found in a large number of cases for it has been invoked times without number in an effort to evade the payment of taxes. Reference to a few of these cases may perhaps be of value.

A surety company does not by becoming surety on bonds required by the United States, act as a federal instrumentality so as to be exempt from a state tax on premiums received.

Fidelity & Deposit Co. v. Pennsylvania, (1916), 240 *U. S.* 319, 60 *L. ed.* 664.

Land conveyed by the United States to a corporation for dry dock purposes is not exempted from state taxation, as an agency of the United States, because of a reservation in the conveyance of the right to the free use of the dry dock, and a provision therein

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"Sec. 8. ******in computing the amount of tax levied under the provisions of this Act for any year there shall be deducted from the values or from the gross receipts of the business, as the case may be, an exemption of thirty thousand ($30,000.00) dollars of the amount of such values or gross receipts. Every person exercising any privilege taxable hereunder for any fractional part of a tax year shall be entitled to an exemption of that part of the sum of thirty thousand ($30,000.00) dollars which bears the same proportion of the total sum that the period of time during which such person is engaged in such business bears to a whole year.

for forfeiture in case of the continued unfitness of the dock for use, or the use of the land for other purposes.

Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, (1904), 195 *U. S.* 375, 49 *L. ed.* 342.

In the telegraph company cases it was held that permission granted by the United States to run lines over the public domain and over postroads, the lines being employed in the national service, did not make the telegraph companies such agencies of the federal government as would exempt their lines and other property from state taxation; the Court saying:

> "Agencies of the federal government are only exempt from state taxation so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the government."

Western Union Tel. Co. v. Attorney-General, (1888), 125 *U. S.* 530, 31 *L. ed.* 790.
Attorney-General v. Western Union Tel. Co., (1891), 141 *U. S.* 40, 35 *L. ed.* 628.
Williams v. Talladega, (1912), 226 *U. S.* 404, 57 *L. ed.* 275.

"Sec. 9. ********If any person after the first day of October, one thousand nine hundred and twenty-nine, shall engage or continue in any business for which a privilege tax is imposed by this Act, he shall be deemed to have applied for and to have duly obtained from the State of Georgia a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the tax accruing to the State of Georgia under the provisions of this Act; and he shall hereby be duly licensed to do such business."

Private property in which the federal government may have an interest or which is subject to its control in the exercise of its power over navigable waters and which is used as a part of a project operated under a federal license, is not exempt from state taxation as an instrumentality of the federal government.

"Property employed in the exercise of a privilege or franchise granted by the federal government, but for private business advantage, is not exempt as a federal instrumentality from state taxation."

Susquehanna Power Co. v. Tax Commission of Maryland, (1931), 283 U. S. 291, 75 L. ed. 1042.

"The use of machinery and boats in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States, does not exempt them from local taxation.

Gromer v. Standard Dredging Co., (1912), 224 U. S. 362, 56 L. ed. 801.

The exemption of salaries of government employees has been strictly limited to actual employees

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Section 10 exempts insurance companies, banks and trust companies, mutual savings banks, mutual fire-insurance companies, labor, agricultural and horticultural societies, farm products, cemetery companies, fraternal benefit societies, mutual building and loan associations, charitable, educational and religious societies, and civic organizations not operated for profit.

Section 11 excepts sales of gasoline.

"Sec. 12. *****the taxes hereby levied shall be payable in quarterly installments, that is to say, all taxes accruing in any quarter shall be payable within

appointed by a government with tenure, emolument, and duties fixed by law. It does not include persons who contract to render a specific service, such as a consulting engineer.

Metcalf v. Mitchell, (1926), 269 *U. S.* 514, 70 *L. ed.* 384.

This is, perhaps, the leading case. In the opinion the Court, speaking through Mr. Justice Stone, said:

> "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. ****** When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentali-

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thirty (30) days after the expiration of such quarters. The taxpayer shall, within said period of thirty (30) days, prepare and mail or otherwise deliver to the State Tax Commissioner a tax-return under oath, together with a remittance for the amount of the taxes due as shown by said return.********".

Sections 13 to 19 contain administrative provisions not pertinent to the present inquiry.

"Sec. 20. ******The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder except as in this Act otherwise specifically provided.****"

Sections 21 to 28 are not material.

ty of government within the meaning of the rule. ********As cases arise lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. **********In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other.****** Taxation by either the state or the federal government affects in some measure the cost of operation of the other.*******Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax**** *****or the appropriate exercise of the functions of the government affected by it."

One having a contract to carry the mails is not immune as an agency of the federal government from state taxation of property used in the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government.

Alward v. Johnson, (1931), 282 *U. S.* 509, 75 *L. ed.* 496.

United States treasury checks or orders issued for the payment of interest accrued on bonds of the United States are held to be taxable by the states.

Hibernia Sav. & Loan Society v. San Francisco, (1905), 200 *U. S.* 310, 50 *L. ed.* 495.

While a tax upon the obligations of a state or its political subdivisions falls within the implied exemption of instrumentalities of state government from federal taxation, the exemption does not extend to cases where no direct burden is laid upon the government instrumentality and there is only a remote influence upon the exercise of the functions of government; as where such securities are sold by the owner, realizing a profit taxable as income.

Willcuts v. Bunn, (1931), 282 *U. S.* 216, 75 *L. ed.* 304.

Recognizing that the full power of imposing excise taxes granted to the national government cannot be constitutionally exercised so as to impede or embarrass a state in the discharge of its functions, yet when a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation.

South Carolina v. United States (1905), 199 *U. S.* 437, 50 *L. ed.* 261.

In many other cases, particularly recent cases, the Court has limited the exemption of government instrumentalities, giving to the doctrine "a practical construction which permits both to function*****so as not to restrict unduly the government imposing the tax****or the functions of the government which may be affected by it."

The Court, for the protection of Indians, wards of the United States, has extended the concept of federal instrumentalities to its greatest length in

Indian Territory Illuminating Oil Co. v. Oklahoma, (1916), 240 U. S. 522, 60 L. ed. 779.

Choctaw, O. & G. R. Co. v. Harrison, (1914) 235 U. S. 292, 59 L. ed. 234.

Jaybird Min. Co. v. Weir, (1926), 271 U. S. 609, 70 L. ed. 1112.

Gillespie v. Oklahoma, (1922), 257 U. S. 501, 66 L. ed. 338.

Appellant strongly relies on the *Gillespie case*, which held that an Indian's income from the lease of his lands is exempt from state taxation.

These cases must be considered in the light of the purpose which Congress had in mind in its Indian legislation:

> "The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation."
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> *Shaw v. Gibson-Zahniser Oil Corp.*, (1928), 276 U. S. 575, 72 L. ed. 709.

It was held in this case that the interest of the lessee of land purchased by the government for a full blood Creek Indian out of royalties on allotted land, and restricted as to alienation, is not such an instrumentality of government as to be exempt from state taxation.

Admitting that "in a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process," it is said in the *Shaw case, supra,* Mr. Justice Stone speaking for the Court:

> "There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.******These lands we take to be of that character."

And in another case in which exemption was claimed, in which Mr. Justice Brandeis delivered the opinion of the Court, it was said:

> "The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation.********And even though it be granted that the federal government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid."

Choctaw, Okla. & G. R. Co. v. Mackey, (1921), 256 *U. S.* 531, 536, 65 *L. ed.* 1076, 1080.

These Indian land cases seem to be recognized as in a class by themselves.

Willcuts v. Bunn, supra.

It is hardly necessary to suggest, using the language of the Chief Justice in the last case cited:

> "The limitation of this principle (the exemption of government securities from taxation) to

its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government." (p. 225).

II

ROYALTIES FROM COPYRIGHTS, IF INSTRUMENTALITIES OF THE UNITED STATES AT ALL, ARE SUCH ONLY IN A QUALIFIED SENSE, DIFFERING FUNDAMENTALLY FROM SUCH INSTRUMENTALITIES AS GOVERNMENT BONDS OR THE SALARIES OF GOVERNMENT OFFICIALS.

"Obviously it is not true that patents are instrumentalities of the government."

This is the statement of Mr. Justice Holmes in his dissenting opinion in *Long v. Rockwood,* (1928), *277 U. S.* 142, *72 L. ed.* 824.

While not going quite so far, Mr. Justice Sutherland said:

> "It may be conceded that a tax measured by income derived from copyrights does not impose a burden on the exercise of a vital power of the federal government as it would in the case of Federal bonds."

This occurs in the dissent in *Educational Films Corporation v. Ward,* (1931), 282 *U. S.* 379, 75 *L. ed.* 400.

As Justices Brandeis, Sutherland, and Stone joined Mr. Justice Holmes in his dissent in the first case, and Justices Van Devanter and Butler agreed with Mr. Justice Sutherland in the second, it would seem that, though the statements were made in the course of dissenting opinions, they express the view of a majority of the members of the Court.

The *Rockwood* and *Ward* cases are discussed in subsequent divisions of this brief.

It would seem there could be no question that royalties from a patent or copyright are not such instrumentalities or agencies of the United States as are federal securities. The interest of the government in a copyright is incidental; not direct or immediate as in the case of a bond. The purpose of a copyright is to encourage and protect authors and secure to them the benefits of their productions The public derives indirect benefit from the encouragement to authors and inventors extended by copyrights and patents, but the government as such has no interest and derives no direct benefit from a copyright or patent, and certainly not from the royalty paid for its use. The government would function in precisely the same way and without the slightest interference though taxes imposed by the states might be so burdensome as to deprive the author or inventor of the fruits of his production.

A copyright is a franchise granted by the United States.

> "The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented without the permission of the patentee. This is all he obtains by the patent."

Bloomer v. McQuewan, (1852), 14 *How.* 539, 549, 14 *L. ed.* 532, 537.

All that the government is interested in is the protection of this franchise which it has granted. A tax on royalties paid under a license from the owner of a copyright, it is submitted, interferes only indirectly and remotely with the copyright, the franchise granted by the government. It lessens to some extent the amount of income which the owner of the copyright would otherwise receive from it, but it does not diminish the right given by the United States to exclude others from "making, using, or vending the thing" copyrighted. That right is just as full and complete with the tax as without it. The tax does not make the privilege less exclusive. This seems to be recognized by the decisions of this Court which permit the states to tax patented articles.

> "Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits.
>
> "There is no objection to the law of Virginia requiring a license for the sale of sewing machines, by reason of the grant of letters patent for the invention."

Webber v. Virginia, (1881), 103 *U. S.* 344, 26 *L. ed.* 565.

The power of the states to exercise control over articles manufactured by patentees, to regulate the assignment of patent rights, and to prevent fraud in connection therewith has been sustained by many decisions of this court.

Patterson v. Kentucky, (1879), 97 *U. S.* 501, 24 *L. Ed.* 1115.

Allen v. Riley, (1906), 203 U. S. 347, 51 L. ed. 216.

Woods v. Carl, (1906), 203 U. S. 358, 51 L. ed. 219.

Ozan Lumber Co. v. Union etc. Bank, (1907), 207 U. S. 251, 52 L. ed. 195.

"The fact that the franchise came from a grant by the United States is no more reason for exemption, standing by itself than is the derivation of the title to a lot of land from the same source", as was observed by Mr. Justice Holmes in the dissenting opinion in *Long v. Rockwood, supra*,

While lands owned by the United States are, of course, free from taxation by the state in which they are located, where the lands, or any interest therein, whether freehold or for years, are sold, such interest is subject to state taxation.

Group No. 1 Oil Co. v. Bass, (1931), 283 U. S. 279, 75 L. ed. 1032.

Trimble v. Seattle, (1914), 231 U. S. 683, 58 L. ed. 435.

Irwin v. Wright, (1922), 258 U. S. 219, 66 L. ed. 573.

Tucker v. Ferguson, (1875), 22 Wall. 527, 22 L. ed. 805.

Forbes v. Gracey, (1877), 94 U. S. 762, 24 L. ed. 313.

New Brunswick v. United States, (1928), 276 U. S. 547, 72 L. ed. 693.

Income from royalties paid for the use of a copyright is derived directly from the contract between the licensee and the owner of the copyright, and not from the copyright itself. A suit to recover such royalties is not a suit arising under the copyright laws and may not be brought in a federal court on that ground.

Wilson v. Sandford, (1850), 10 *How.* 99, 13 *L. ed.* 344.
Excelsior Wooden Pipe Co. v. Pac. Bridge Co., (1902), 185 *U. S.* 282, 46 *L. ed.* 910.
Luckett v. Delpark, (1926), 270 *U. S.* 496, 70 *L. ed.* 703.

In dealing with a situation somewhat similar, the Chief Justice, in a recent case already referred to, said:

> "But it does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a nondiscriminatory excise tax upon the profits derived from the sale of such bonds. The sale of the bonds by their owners, after they have been issued by the state or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds."

Willcuts v. Bunn, supra. (p. 227).

The appellant owns the copyright on certain motion pictures. Under the exclusive franchise granted by the copyright it has reproduced these pictures and owns them in the form of films. It has granted to exhibitors the right to exhibit these pictures, using the films for the purpose.

The Supreme Court of Pennsylvania quotes from the opinion by Mr. Justice Field in *Webber v. Virginia, supra*:

> "The right conferred by the patent laws of the United States on inventors, to sell their inventions and discoveries, does not take the tangible property in which the invention or discovery

may be exhibited or carried into effect from the operation of the tax and license laws of the state.'

This Court then draws the clear distinction between the patent right and the interest of a lessee or licensee of the patented article, saying:

> "Whether the 'tangible property'—that is, the machines or appliances made and ready for use—is in the hands of the makers, of venders, lessees, or licensees, can make no difference. Such property is not a patent right, but the visible, tangible, fruit of the right secured by the patent, which passes to a purchaser or lessee in precisely the same way that any other manufactured articles pass from the maker to the buyer or lessee."

Commonwealth v. Edison Electric Light Co., 145 *Pa. State* 131, 27 *Am. St. Rep.* 683.
Commonwealth v. Central Dist. etc. Co., 145 *Pa. State* 121, 27 *Am. St. Rep.* 677.

In the instant case the owner of the copyright licenses films produced under the copyright for exhibition. In the Pennsylvania cases the owner of the patent on certain telephone apparatus leased the patented appliances for use in a telephone system. Are not the two cases precisely analagous?

The owner of a copyright on a book grants to a publisher the right to print 100,000 copies. These books, when printed, are tangible property owned by the purchaser and are subject to tax like any other property in the state in which they are found. Is there any essential difference between books printed and on which the publisher pays to the owner of the copyright a royalty and a motion picture exhibited under a license from the owner of the copyright on that picture for which a royalty is paid?

If patented articles were not subject to taxation by the states the patent would be more valuable, but since *Webber v. Virginia* it seems to be the settled law that they are subject, and that the patent is not interfered with or the franchise granted by Congress limited or impaired by such taxation. We are unable to see any substantial difference between taxing a patented article and taxing the exhibition of a copyrighted film. Neither, it seems to us, is an instrumentality of the United States in the sense in which that term is used in the decisions to which reference has been made. The taxation of neither interferes with the federal government in the discharge of any of its functions. Neither limits the franchise granted by Congress. In both the effect on the value of the franchise is small, incidental, and casual.

We adopt the language of Mr. Justice Stone in *Susquehanna Power Co. v. State Tax Commission, supra*:

> "It would be difficult to suppose any case in which the adverse effect of a tax upon a governmental purpose would be more remote or attenuated, or in which the asserted immunity would more seriously impair the sovereign power of the state to tax, than in this one."

III

LONG v. ROCKWOOD, (1928), 277 U. S. 142, 72 L. ed. 824.

This seems to be the only case in which it has been held that royalties from a patent or copyright are instrumentalities of the United States and are not subject to taxation by the states. There is a casual

intimation by Chief Justice Marshall in *McCulloch v. Maryland*, 4 *Wheat.* 316, 432, that patent rights are instrumentalities of the government, but the court was not called on to decide the question until it was presented in *Long v. Rockwood.*

The majority of the court, speaking through Mr. Justice McReynolds, said:

> "The power to exclude others granted by the United States to the patentee subserves a definite public purpose—to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And the settled doctrine is that such instrumentalities may not be taxed by the states."

The patent right is compared to a corporate franchise granted by the United States, and the opinion of Mr. Justice Bradley in *California v. Pac. R. Co.*, (1888), 127 *U. S.* 1, 32 *L. ed.* 150 that "**** it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state", is quoted to sustain the Court's position.

It may be remarked, parenthetically, that if the state cannot legally tax a franchise granted by the United States, neither can Congress tax a franchise granted by the state, but the Corporation Tax Act of 1909 did just that, and measured the amount of the tax by income. It was upheld by this Court.

> "The excise imposed by the act of August 5, 1909, §38, upon the carrying on or the doing of business, in a corporate or quasi corporate capacity, is not invalid because the business taxed

is done in pursuance of the authority granted by a state, in the creation of private corporations."

Flint v. Stone Tracy Co., (1911), 220 *U. S.* 107, 55 *L. ed.* 389.

The court distinguishes the *Pacific Railroad case*, from which Mr. Justice McReynolds quoted, along with a number of others, some of which are cited by him, saying:

> "An examination of these cases will show that in each case where the tax was held invalid, the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the federal government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers." (p. 152).

The Court also quotes from the great opinion of Chief Justice Marshall in *Osborne v. Bank of United States*, 9 *Wheat.* 738, 6 *L. ed.* 204, in which he concedes that if the bank were a mere private corporation engaged in its own business it "would certainly be subject to the taxing power of the state as any individual would be."

In these cases, familiarly known as the Corporation Tax cases, the whole subject of exemption of instrumentalities of government is discussed, the conclusion being that only those instrumentalities which are created to carry into effect powers appertaining to the government as a sovereign and which are necessary for the proper exercise of those powers, are exempt.

Is not the opinion of the majority, speaking through Mr. Justice McReynolds, at variance with his dissent in *Jaybird Min. Co. v. Weir, supra*, in which

he expressed the "opinion that the effect of the assailed tax upon the instrumentality of the United States is remote and tax is valid under the doctrine approved in Central P. R. Co. v. California, 160 U. S. 91, 119", the very case, by the way, from which he quotes and on which he principally relies in holding the tax challenged in the *Rockwood* case invalid?

With great deference, it may be suggested that the tax considered in the *Rockwood* case was not on the patent or on a "franchise granted by the United States." The franchise granted is "the right to exclude everyone from making, using or vending the thing patented (or copyrighted) without the permission of the patentee." *Bloomer v. McQuewan, supra.* The tax was upon the income growing out of a private contract between the patentee and one to whom he had granted permission to use an article produced under the patent.

It would seem that the principle of exemption of governmental instrumentalities is extended further in this case than it has been in any previous decision. Indeed, the decisions of this Court have indicated a purpose to restrict the doctrine within narrow limits so as not to hamper either the state or the federal government, as the case may be, in the exercise of the essential power of taxation. The doctrine grows out of the necessity, under our dual system, of preserving the national and the state governments in the exercise of their governmental functions. It is difficult to see how a non-discriminatory tax imposed by a state can be said to impede or hamper the federal government in the discharge of a governmental function because profits arising out of a private contract for the use

of an article produced under a copyright are included in the gross receipts by which the tax is measured.

In the dissenting opinion of Mr. Justice Holmes, in which Justices Brandeis, Sutherland, and Stone concurred, it was asserted, not that the states might tax the royalties, but the patent or copyright itself.

> "Why then cannot a state tax a patent by a tax that in no way discriminates against it? *Obviously it is not true that patents are instrumentalities of the government.* They are used by the patentees for their private advantage alone. If the government uses them it must pay like other people. Richmond Screw Anchor Co. v. United States, (1928), 275 U. S. 331. The use made by the patentee may be not to make and sell the patented article but simply to keep other people from doing so in aid of some collateral interest of his own. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 422, 424. In this case the advantages expected by the government are mainly the benefits to the public when the patent has expired and secondarily the encouragement of invention. Pennock v. Dialogue, 2 Pet. 1, 19. The most that can be said is that a tax is a discouragement so far as it goes and to that extent in its immediate operation runs counter to the government intent. But patents would be valueless to their owner without the organized societies constituted by the states, and the question is why patents should not contribute as other property does to maintaining that without which they would be of little use." (Italics ours.)

Again we call attention to the unanimous decision of the Court in *Shaw v. Gibson-Zahniser Oil Corp., supra,* where it was held that there are some instrumentalities of government which will be sub-

ject to state taxation unless Congress expressly prohibits it, and that whether in the absence of an express declaration by Congress governmental instrumentalities are exempt must be determined from the purpose and the character of the legislation creating them. Patents and copyrights and royalties therefrom are not exempted from state taxation by express congressional declaration and, we respectfully submit, there is nothing in the Constitution or the laws under which patents and copyrights are granted which makes necessary such exemption in order to carry out fully the purpose designed to be accomplished by the grant of the patent or copyright. A copyright is property owned by a private individual and used by him for private purposes and for the enhancement of his private fortune. It is protected by the state and would be of little value were it not so protected. What reason is there to exempt its owner from taxation of this property to the same extent and by the same methods adopted for other property which receives no greater benefit and no higher protection from the state?

If the *Rockwood* decision is carried to its logical conclusion, the states will be crippled in the raising of their revenue, and manifest inequalities and discriminations must be made in the levy and collection of taxes. Under present conditions a large part of the business of the country is based on patents and copyrights. If these, and revenues derived from them, cannot be taxed as other property, income, and business in the states are taxed, monopolies will be created and injustice done to the states and their citizens. The states themselves will lose very considerable revenue, though the federal government will not be benefitted in the remotest degree.

If this decision is allowed to stand, we respectfully submit that it should not be extended but should be confined to the exact question decided by the Court. This decision is that "a state cannot, under the provisions of the Federal Constitution, tax royalties for the use of patents issued by the United States."

The Massachusetts tax which was challenged was an income tax. An income tax, under the decisions of this Court, and certainly under the decisions of the Supreme Judicial Court of Massachusetts, is a direct tax.

Pollock v. Farmers' Loan Co., (1895), 157 *U. S.* 429, 39 *L. ed.* 759.
Hart v. Tax Commissioner, 240 *Mass.* 37, 132 *N. E.* 621.
Eaton, etc. Co. v. Commissioner, 237 *Mass.* 523, 130 *N. E.* 99.
Re Opinion of the Justices, 165 *N. E.* 900.

The Massachusetts Court in this very case held in terms that "It was a property tax."

Rockwood v. Commissioner, 257 *Mass.* 572, 154 *N. E.* 182.

The effect of the *Rockwood* decision is, then, that a direct tax on royalties received from a patented article cannot be imposed by the states. The court does not hold that these royalties are instrumentalities of the United States in the sense that government bonds are, and as Mr. Justice Holmes said, "obviously they are not." It is not held that these royalties may not be taxed indirectly or be included in the measure of a tax imposed on a legitimate subject of state taxation or that they stand on a different footing from interstate commerce, where the rule, established by the

decisions of this Court, is that a state tax affecting such commerce is valid if it affects such commerce not directly but only incidentally and remotely.

IV.

EDUCATIONAL FILMS CORPORATION V. WARD, (1931), 282 U. S. 379, 75 L. ed. 400.

In this case the question was again raised as to the immunity of copyrights and income derived from them from state taxation. The case also presented the question as to whether a tax measured by net income is void so far as the measure includes royalties from copyrights. The court directed its attention to the second proposition, leaving the first undecided except so far as it had been settled in *Long v. Rockwood, supra.*

We trust that the failure of the Court to reaffirm the *Rockwood* case is an intimation that the decision was not satisfactory to a majority of the Court, and that it was allowed to stand only because it was not necessary for the decision of the case *sub judice* to overrule it. Be that as it may, the *Educational Films* case, not in terms but in practical effect, limits the *Rockwood* decision to the question actually decided, which was that a state may not impose a *direct tax* on a patent or income derived therefrom. Expressly approving *Flint v. Stone Tracy Co.*, (1911), 220 *U. S.* 107, 162; 55 *L. ed.* 389, 417, and the long line of cases which have followed it, the Court held that the tax in question was a tax on the franchise of the corporation, the right to do business in a corporate capacity, measured by net income and was valid, although royalties from copyrights were included in the income. This decision reaffirms the statement that:

"The immunity of federal instrumentalities from state taxation must be given such a practical construction as will not, on the one hand, unduly restrict the power of the government imposing the tax, or, on the other hand, the exercise of the functions of the government which may be affected by it."

And in it the Court went further and said:

"The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government.

"The boundaries between the respective powers and immunities of state and national governments should be so drawn as to preserve to each government, within its own sphere, the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other." (Sylabus Lawyer's Edition, 75 L. ed. 400.)

V

THE TAX IMPOSED BY THE GEORGIA ACT OF 1929 IS AN EXCISE TAX UPON THE PRIVILEGE OF ENGAGING IN CERTAIN OCCUPATIONS AND UPON CERTAIN BUSINESS AND COMMERCIAL TRANSACTIONS. IT IS A PRIVILEGE OR OCCUPATION TAX MEASURED BY GROSS RECEIPTS.

The purpose of the act, the pertinent provisions of which are set out in the margin, (pp. 2 et seq.), as declared in its title is:

"To provide for the raising of public revenue by a tax upon the privilege of engaging in certain occupations and by a tax upon certain business and commercial transactions and enterprises ****".

This legislative intent is unmistakable, running through the entire act. There is not the slightest suggestion of any other purpose, and no clause is inconsistent with the purpose declared. It is evident that the General Assembly of Georgia intended to impose a license or excise tax on the privilege of "doing business" in the state. On merchants and manufacturers, it is, in effect, a sales tax, and it is popularly so called. Other lines of business besides merchandising are taxed on their gross receipts in excess of an exemption of $30,000, different rates being made applicable to different businesses. Certain other businesses, which it was believed were already bearing their proper proportion of the tax burden or which public policy suggested should be exempted, were excluded from the operation of the act.

The tax is payable quarterly, and it was provided that

> "If any person****shall engage or continue in any business for which a privilege tax is imposed by this act he shall be deemed to have applied for and to have duly obtained from the State of Georgia a license to engage in and conduct such business for the current tax year upon the condition that he shall pay the tax accruing under the provisions of this act, and he shall thereby be duly licensed to do such business." (Sec. 9).

In the only decision by the Georgia courts in which the act has been construed, it is held to be, not a tax on income, but on the privilege of doing business.

> "It is clear that the act was not intended to lay a tax upon the plaintiff's primary franchise, that is, its right to live and have its being as a corporation, but that the imposition is an excise

tax upon the secondary franchise, or the privilege of doing business in its corporate capacity. Von Baumbach v. Sargent Land Co., 242 U. S. 503; Flint v. Stone Tracy Co., 220 U. S. 107; People ex rel. Lehigh & New York R. Co. v. Sohmer, 217 N. Y. 443; 14A C. J. 544 et seq. *The assessment is not a tax on income.********The plaintiff is not liable unless it was engaged in doing business within contemplation of the statute. If it was not so engaged, the magnitude of its business or receipts is immaterial. On the other hand, it makes no difference how small a business it may have carried on, provided its gross receipts exceeded the exemption (see section 8) if it in fact did engage in business. In the former case it would be nontaxable; in the latter taxable."

Norman v. Southwestern R. Co., 42 Ga. App. 812, 815, 157 S. E. 531.

VI

THE STATES MAY LAWFULLY IMPOSE AN EXCISE TAX UPON THE PRIVILEGE OF DOING BUSINESS WITHIN THE STATE EVEN THOUGH THERE BE INCLUDED IN THE MEASURE OF THE VALUE OF SUCH PRIVILEGE INSTRUMENTALITIES OR INCOME WHICH ARE EXEMPT FROM DIRECT TAXATION.

This was distinctly reaffirmed in *Educational Films Corporation v. Ward, supra.* The Court reviewed a large number of cases in which the principle had been established and uniformly adherred to for more than seventy years. As the Court has so recently thoroughly considered the question, only a brief reference will be made to a few of the many cases.

The typical case, of course, is *Flint v. Stone Tra-*

cy Co., supra, which upheld a federal tax levied upon a corporate franchise granted by a state but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds.

The state has power to levy a franchise tax on a state bank without deducting an amount invested in United States securities, although the amount of the tax is measured by the deposits.

Society for Sav. v. Coite, (1868), 6 *Wall.* 594, 18 *L. ed.* 897.
Provident Inst. v. Massachusetts, (1868), 6 *Wall.* 611, 18 *L. ed.* 907.

Likewise a manufacturing corporation may be taxed on its franchise measured by the excess of the market value of its capital stock over the value of its real estate and machinery, though a large part of its capital is invested in nontaxable securities.

Hamilton Mfg. Co. v. Massachusetts, (1868), 6 *Wall.* 632, 18 *L. ed.* 904.

And a corporation may be taxed by a tax levied upon its corporate franchise and measured by the percentage of dividends based upon the capital stock without deducting the amount of capital stock invested in United States bonds.

Home Ins. Co. v. New York, (1890), 134 *U. S.* 594, 33 *L. ed.* 1025.

State laws taxing shareholders on the full value of their shares in national banks, although the banks own tax exempt federal securities, are also upheld.

Van Allen v. Assessors, (1866), 3 *Wall,* 573, 18 *L. ed.* 229:
Peoples Natl. Bank v. Board of Equalizers, (1922), 260 *U. S.* 702, 67 *L. ed.* 471.

Des Moines Natl. Bank v. Fairweather, (1923), 263 *U. S.* 103, 68 *L. ed.* 191.

Congress may tax state banks upon the average amount of their deposits although deposits of state funds by state officers are included.

Manhattan Co. v. Blake, 148 *U. S.* 412, 37 *L. ed.* 504.

The Court of Appeals of New York has applied the principle to capital invested in patents, holding that a corporation may be taxed upon its francise computed upon the basis of the amount of its capital stock employed within the state, although such capital stock is substantially all invested in United States patents.

People Ex. Rel. U. S. Aluminum Printing Plate Co. v. Knight, (1903), 174 *N. Y.* 475, 63 *L. R. A.* 87.

There are a few cases which seem to be out of harmony with the long line of which those cited are only a small part. This apparent conflict in the cases arises from the construction placed upon the taxing statute; if construed as a tax on property, or a direct tax on the income of property which is the same, government securities or other instrumentalities are held to be exempt, but if construed as an excise or franchise tax they are not. Whether the tax is one or the other is often a difficult question. Under the more recent cases the purpose of the legislature in enacting the taxing statute seems fundamental in determining whether the statute is valid as imposing a franchise tax or invalid as imposing a property or income tax, and this purpose is not to be determined merely by the desig-

nating terms or form of the statute or the construction placed upon it by the state court.

Educational Films Corp. v. Ward, supra.

Keeping in mind the distinction between a tax on property and a franchise or other form of excise tax, the decisions may be easily reconciled, the conflict being apparent rather than real. The two cases which at first blush seem to depart from the rule as established by previous decisions are *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 *U. S.* 136, 72 *L. ed.* 202 and *Macallen v. United States*, 279 *U. S.* 620, 73 *L. ed.* 874.

In both the state statute in question imposed a tax which in form was an excise, and both were so construed by the state courts. In the first case it was said by this Court:

> "If the challenged act, *whatever called*, really *imposes a direct charge upon interest* derived from United States bonds it is *pro tanto* void. The fundamental question often presented in cases similar to these is whether by true construction of the statute the assessment must be regarded as an assessment upon property or one upon privileges or franchise of the corporation." (p. 140 Italics ours).

The Court construed the Wisconsin statute as imposing a tax upon property and not on privileges or franchise. So construed the tax was on the income from bonds of the United States and, of course, violated the constitutional inhibition. The tax in that case purported to be measured by gross income.

In the *Macallen case*, the state court held the tax to be an excise on the privilege of doing business measured by net income. This Court said:

"The distinction pointed out in these cases (*Flint v. Stone Tracy Co., supra,* and others of similar import) is between an *attempt to tax the property or income as such* and *to measure a legitimate tax upon the privileges involved in the use thereof.* It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the nontaxable subject by its use as a measure of value was fortuitous and incidental.********courts, in scrutinizing taxing acts like that here involved should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a nontaxable subject by a deceptive use of words.*********On the one hand, the state is at liberty to tax a corporation with respect to doing of its business. On the other hand, the state cannot tax the income of the corporation derived from nontaxable securities." (pp. 628, 629, 630. Italics ours.)

It was shown in the *Macallen* case that the act in question had been amended for the express purpose of reaching the income from nontaxable securities. The conclusion of the Court was that "the amended act in substance and effect imposes a tax upon federal bonds and securities."

The underlying principle upon which these cases are decided is, therefore, in entire harmony with previous decisions of the Court.

The distinction between a tax upon property or income derived therefrom and an excise tax on the privilege of doing business or the franchise of a corporation is also well illustrated in the two cases already discussed which involved the royalties or income from patents and copyrights. In *Long v. Rockwood,*

supra, the tax was a direct tax on income which, in Massachusetts at least, is a property tax. In *Educational Films Corporation v. Ward, supra*, the tax was an excise on the corporate franchise, that is, the right to do business in a corporate capacity, measured by income.

If royalties from copyrights are to be regarded as federal instrumentalities, the first case correctly decided that such royalties were exempt from the income tax imposed. In the second case, it was also consistently held that these royalties whether instrumentalities of the United States or not could be included in income by which the franchise tax was measured.

VII

THAT THE TAX IS MEASURED BY GROSS RECEIPTS RATHER THAN BY NET INCOME DOES NOT CHANGE THE NATURE OF THE TAX OR MAKE IT A DIRECT TAX ON AN INSTRUMENTALITY OF THE UNITED STATES.

It is insisted that the *Educational Films Corporation* case, *supra*, is not controlling because in that case the tax was measured by net income, while in the instant case it is measured by gross receipts. Appellant relies on the case of *Northwestern Mut. Life Ins. Co. v. Wisconsin, supra*, in support of the proposition that under a state tax measured by gross receipts the income from Federal securities cannot be included. We have already discussed this case and have endeavored to show that the Court held the Wisconsin tax to be a direct tax on income rather than an excise tax on the franchise of the corporation. The Court did not hold that a franchise tax could not be measured by gross receipts though Mr. Justice McReynolds did re-

fer to the fact that the tax was upon gross receipts and not net income as it was in *Flint v. Stone Tracy Co., supra,* and stated that the distinction between the two was clear. But this was not the controlling factor in reaching the conclusion that "the statute undertook to impose a charge of 3% upon every dollar of interest received by the company from United States bonds". The learned Justice pointed out the difficulty in determining whether "the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation".

It must not be forgotten, that

> "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government, or violating the guaranties of the Federal Constitution, the states have the attributes of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests."
>
> *Ohio Oil Co. v. Conway,* (1930), 281 *U. S.* 146, 74 *L. ed.* 775.
>
> "The power of taxation is a fundamental and imperious necessity of all governments, not to be restricted by mere legal fictions."
>
> *Tyler v. United States,* (1930), 281 *U. S.* 497, 74 *L. ed.* 991.
> (Both quotations from sylibi in Lawyers Edition).

No one would question the right of a state to impose a franchise tax on corporations of its creation, or a privilege or license tax upon doing business within its borders. These are legitimate subjects of state taxation generally, well nigh universally, adopted to supplement revenues derived from the direct taxation of

property and income. In the measurement of these taxes the state is unrestricted. In the case of *Home Ins. Co. v. New York, supra,* the tax under consideration was upon the "corporate franchise or business of the corporation," that is, "the right of doing business in a corporate capacity." Mr. Justice Field, who delivered the opinion, declared:

> "The granting of such right or privilege rests entirely in the discretion of the state, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, *or a specific portion of its gross receipts or of the profits of its business,* or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem best to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." (Italics ours.)

There are a number of cases in which it has been held that "a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom."

> *East Ohio Gas Co. v. Tax Commission of Ohio,* (1931), 283 *U. S.* 465, 75 *L. ed.* 1171, *and cases cited.*

An examination of these cases, we believe, will show that in all of them the tax was laid, either ex-

pressly or by implication, on the gross receipts *as such.* While the tax may have been denominated a franchise tax, it was held to be a tax on engaging in interstate commerce and amounted to a regulation of that commerce, and was therefore beyond the power of the taxing state.

N. J. Bell Tel. Co. v. State Board of Taxes, (1930) 280 *U. S.* 338, 74 *L. ed.* 463.

The right of a state to tax the gross receipts of an interstate carrier in lieu of a tax on its property, including its franchise, and its value as a part of a system, is well established.

Cudahy Pkg. Co. v. Minnesota, (1918), 246 *U. S.* 450, 62 *L. ed.* 827.

United States Express Co. v. Minnesota, (1912), 223 *U. S.* 335, 56 *L. ed.* 459.

"A taxing act which requires payment of a certain percentage of the gross earnings of an interstate carrier, but which practically imposes no more than the ordinary charge upon local property, may be sustained.*********The power to tax proprety necessary to conduct interstate commerce has been often upheld; and without doubt the states by apt enactments may tax the ordinary property, franchises, or business of their own corporations."

Northwestern Mut. Life Ins. Co. v. Wisconsin, supra.

Fifty years ago, in a case involving a state tax on railroad gross receipts, it was held:

"It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent

of its exercise; nor is it deniable that *gross receipts may be a measure of proximate value*, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise." (Italics ours.)

Phila. & Reading R. Co. v. Pennsylvania, (1873), 15 *Wall.* 284, 21 *L. ed.* 164, 169.

A state has no right to tax or otherwise burden interstate commerce. Therefore, a tax which has the effect of imposing a direct burden on such commerce is unconstitutional. But where the tax is imposed on a subject which is within the state's jurisdiction and taxing power, the state is not restricted in the means which it may employ, and it may measure the tax by any method which it chooses to adopt.

"While a state may not use its taxing power to regulate or burden interstate commerce, a state excise tax which affects such commerce not directly, but only incidentally and remotely, may be entirely valid, where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Hump Hairpin Co. v. Emmerson, (1922), 258 *U. S.* 290, 66 *L. ed.* 622.

The validity of the tax depends not upon the *method adopted for its measurement*, but upon the *subject on which it is imposed*. If that subject be within the taxing power of the state the tax is upheld, although the measure may be the gross amount of nontaxable subjects.

A state inheritance or legacy tax is valid although

measured by the value of federal securities which are transmitted .

Plumber v. Coler, (1900), 178 *U. S.* 115, 44 *L. ed.* 998.
Orr v. Gilman, (1902), 183 *U. S.* 278, 46 *L. ed.* 196.
Blodgett v. Silberman, (1928), 277 *U. S.* 1, 72 *L. ed.* 749.

Indeed, an inheritance tax may be levied by a state upon a bequest to the United States.

United States v. Perkins, (1896), 163 *U. S.* 625, 41 *L. ed.* 287.

And by the United States on a bequest to a municipality.

Snyder v. Bettman, (1903), 190 *U. S.* 249, 47 *L. ed.* 1035.

The Georgia statute imposes a tax upon doing business. It may very well be that it would be invalid if enforced against an interstate carrier, because the very business engaged in is one which is beyond the power of the state to regulate. The business of appellant is not withdrawn from the jurisdiction of the state as is interstate commerce. Exemption is claimed on an entirely different ground. The commerce cases, therefore, can have but slight application.

VIII

THE TAX IN QUESTION IN FORM, EFFECT, AND OPERATION IS WHAT IT PURPORTS TO BE,—A BUSINESS TAX, AN EXCISE ON THE PRIVILEGE OF ENGAGING IN BUSINESS WITHIN THE STATE. THERE WAS NO PURPOSE TO TAX INSTRUMENTALITIES OF THE UNITED STATES.

The most careful reading of the act, in our opinion, will fail to disclose any purpose other than that plainly expressed in the title as follows:

> "An Act to Provide for the Raising of Public Revenue by a Tax upon the Privilege of Engaging in certain occupations and by a tax upon Certain Business and Commercial Transactions and Enterprises."

Over and over again the act refers to "doing business" or "continuing to do business" as the thing taxed. The amount of the tax is measured by the gross receipts of the particular business engaged in. Far from there being any covert design or purpose to impose a direct tax on securities or other instrumentalities of the federal government, or to tax exports or interstate commerce which are exempt from state taxation, it was expressly provided in section 7 of the act:

> "There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the Constitution of the United States of America."

Whether a state tax contravenes rights secured by the Federal Constitution "must depend not upon any mere consideration of form, construction or definition, but upon the practical operation and effect of the tax imposed."

> *Shaffer v. Carter*, (1919), 252 *U. S.* 37, 64 *L. ed.* 445.

In this case the Court, speaking through Mr. Justice Pitney, laid down broadly the principles upon which the right of the states to tax is based, saying:

"In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises.**********

"The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In M'Culloch v. Maryland, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the Federal government, Mr. Chief Justice Marshall, speaking for the court, conceded (pp. 428, 429) that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction, saying: 'It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation,' etc." (pp. 50, 51).

It was observed by the Chief Justice, then Mr. Justice Hughes, that

"We have recently had occasion (Baltic Min. Co. v. Mass. 231 U. S. 68, 83) to emphasize the necessary caution that every case involving the validity of a tax must be decided upon its own facts, and if the tax purports to be laid on

a subject within the taxing power of the state it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Kansas City etc. Co. v. Kansas, (1916), 240 *U. S.* 227, 233, 60 *L. ed.* 617, 619.

The right of a state to impose a tax on all persons, natural or artificial, who engage in any character of business within the state will hardly be questioned for, as the Court has said:

"Nothing can be more certain in legal decisions than that the privileges and franchises of a private corporation, all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government."

Society for Sav. v. Coite, 6 *Wall.* 594, 607, 18 *L. ed.* 897, 902.

In the *Educational Films Corporation* case it was argued that "there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter." The argument was answered by the Court, speaking through Mr. Justice Stone, who said:

"But it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not

be open to question if its amount were arrived at by any other non-discriminatory method."

And the Court said further in that case:

> "This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government." (pp. 391, 392).

Keeping in mind the end sought by the principle of immunity of governmental instrumentalities from taxation, and that the purpose is the preservation to each government within its own sphere of the freedom to carry on those functions committed to it by the Constitution without undue interference by the other, can it be said that a state excise tax on the privilege of doing business within a state, applicable to all alike who are engaged in such business, measured by the gross receipts in excess of a substantial exemption, hampers, impedes, or imposes a burden upon the government of the United States in the discharge of any governmental function because there may be included within the measure of the tax receipts from royalties from patents or copyrights? Can it be said that the present tax, "viewed in the light of actualities imposes any such real or direct burden on the federal government as to call for the application of a different rule" from that laid down in the *Educational Films Corporation* case?

The income tax challenged in *Macallen Co. v. Massachusetts, supra,* was purposely and designedly aimed at income on bonds of the United States. It cannot be said that the tax involved in the instant case

was intended to subject copyrights or the royalties therefrom.

> "That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference."
>
> *Educational Films Corp. v. Ward, supra.*

> "A tax may very well be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."
>
> *Miller v. Milwaukee,* (1927), 272 *U. S.* 713, 71 *L. Ed.* 487.

If this is true with reference to bonds of the United States certainly it is true as to copyrights and patents and the royalties therefrom, which, if they can rightly be regarded as instrumentalities of the government at all are only such in a qualified sense, not being necessary to the conduct of any essential governmental function, being granted for the benefit of the individual author or inventor and constituting his personal property.

IX

IN CONCLUSION, we respectfully insist, First: That the royalties from the copyrights owned by appellant are not such instrumentalities of the federal government as are immune from state taxation; and,

Second: That even if such royalties are considered as federal instrumentalities, the Georgia excise tax on "doing business" in the state, measured by gross

receipts, is valid, although the measure includes such royalties; and the judgment of the Supreme Court of Georgia should be affirmed upon both grounds.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1931.

Fox Film Corporation, Appellant, *vs.* Paul H. Doyal, et al., Members of the State Revenue Commission.	Appeal from the Supreme Court of the State of Georgia.

[May 16, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, a New York corporation which is engaged within the State of Georgia in the business of licensing copyrighted motion pictures, brought this suit to restrain the collection of the state tax upon the gross receipts of royalties under such licenses. The tax was challenged upon the ground that copyrights are instrumentalities of the United States. On demurrer, the suit was dismissed, and the Supreme Court of the State, the Justices being equally divided in opinion, affirmed the judgment. 172 Ga. 403. The case comes here on appeal.

The Gross Receipts Tax Act (Georgia Laws, 1929, p. 103), describes the tax as laid "upon the privilege of engaging in certain occupations" and "upon certain business and commercial transactions and enterprises". As the tax is measured by gross receipts, the case is not ruled by *Educational Films Corporation* v. *Ward*, 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its application to gross receipts, is to impose a direct charge upon the royalties. *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 275 U. S. 136, 141. See, also, *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, 297; *United States Glue Company* v. *Oak Creek*, 247 U. S. 321, 328, 329; *New Jersey Bell Telephone Company* v. *State Board*, 280 U. S. 338, 346. The question is thus presented whether copyrights are to be deemed instrumentalities of the Federal Government and hence immune from state taxation.

The Constitution empowers the Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". Art. I, sec. 8, par. 8. The production to which the protection of copyright may be accorded is the property of the author and not of the United States. But the copyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one. *Wheaton* v. *Peters*, 8 Pet. 591, 661; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 291; *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 362; *Caliga* v. *Inter Ocean Newspaper*, 215 U. S. 182, 188. The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter. U. S. C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, should be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 422, 424. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects." *Kendall* v. *Winsor*, 21 How. 327, 328; *Grant* v. *Raymond*, 6 Pet. 218, 241, 242.

The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), and

the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions". *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an "entire absence of power" (*Johnson* v. *Maryland*, 254 U. S. 51, 55, 56), but it does not exist "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government". *Willcuts* v. *Bunn*, 282 U. S. 216, 225.

In this instance, the mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor does the fact that the grant is made in furtherance of a governmental policy of the United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity. The disposition by the Government of public lands, in order to advance the general interest by promoting settlement, illustrates the principle and its limitation. The property of the United States is not subject to state taxation (*Van Brocklin* v. *Tennessee*, 117 U. S. 151) but the property of individual owners, although derived from the United States under its public land laws, may be taxed. The power to tax exists as soon as the ownership is changed. *Witherspoon* v. *Duncan*, 4 Wall. 210, 219. Though the legal title remains in the Government, if the proceedings have reached the point where nothing more remains to be done by the entryman and the Government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land as subject to taxation. *Bothwell* v. *Bingham County*, 237 U. S. 642, 647.[1] Again, the possessory right of a qualified locator after discovery of minerals is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such interest from early times has been held to be vendible, inheritable, and taxable. *Forbes* v. *Gracey*, 94 U. S. 762, 766, 767;

[1]See, also, Carroll *v.* Safford, 3 How. 441, 461; Tucker *v.* Ferguson, 22 Wall. 527, 572; Wisconsin Railroad Co. *v.* Price County, 133 U. S. 496, 505; Irwin *v.* Wright, 258 U. S. 219, 228, 229; New Brunswick *v.* United States, 276 U. S. 547, 556; Exchange Trust Company *v.* Drainage District, 278 U. S. 421, 425; Group No. 1 Oil Corporation *v.* Bass, 283 U. S. 279, 282.

Elder v. *Wood*, 208 U. S. 226, 232; *Union Oil Company* v. *Smith*, 249 U. S. 337, 349; *Irwin* v. *Wright*, 258 U. S. 219, 231.[2] It is thus apparent that the mere fact that a property right is created by statute to fulfil a governmental purpose does not make it non-taxable when it is held in private ownership and exercised for private advantage. See *Susquehanna Power Co.* v. *State Tax Commission* (*No. 1*), 283 U. S. 291, 297.

We are of the opinion that no controlling distinction can be based, in the case of copyrights, upon the character of the right granted. The argument that it is in the nature of a franchise or privilege bestowed by the Government, is met by the fact that it is not a franchise or privilege to be exercised on behalf of the Government or in performing a function of the Government. The 'mining claim' above mentioned, or the possessory right to explore and work a mine under the applicable Federal laws and regulations, may also be regarded as a franchise or privilege, but the Court found the right to be none the less taxable, observing in *Forbes* v. *Gracey*, *supra*, that "those claims are the subject of bargain and sale and constitute very largely the wealth of the Pacific coast States". Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the Government has in the use of the property which is the subject of the grants. After the copyright has been granted the Government has no interest in any action under it save the general one that its laws shall be obeyed. Operations of the owner in multiplying copies, in sales, in per-

[2]Even the reservation to the United States, in its grant of property, of a right of user for particular governmental purposes does not necessarily withdraw the property granted from the taxing power of the State. Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375. Property in private ownership is not rendered non-taxable by the mere fact that it is the property of an agent of the Government and is used in the conduct of the agent's operations and is necessary for the agency, when Congress has not provided for its exemption. Railroad Company *v.* Peniston, 18 Wall. 5, 33; Central Pacific Railroad *v.* California, 162 U. S. 91, 125; Gromer *v.* Standard Dredging Co., 224 U. S. 362, 371; Choctaw, Oklahoma & Gulf R. R. Co. *v.* Mackey, 256 U. S. 531, 537; Shaw v. Oil Corporation, 276 U. S. 575, 581.

formances or exhibitions, or in licensing others for such purposes, are manifestly not the operations of the Government. A tax upon the gains derived from such operations is not a tax upon the exertion of any governmental function.

In *Gillespie* v. *Oklahoma*, 257 U. S. 501, the question concerned income derived from leases of restricted Indian lands. The leases were deemed to be instrumentalities of the United States in carrying out its duties to the Indians, and the Court, speaking through Mr. Justice Holmes, concluded that the tax imposed by Oklahoma was "a direct hamper upon the effort of the United States to make the best terms that it can for its wards." *Id.*, p. 506. A similar result was reached in the recent ruling in relation to what was deemed to be the correlative case of leases by Oklahoma of lands held by the State for the support of its schools. *Burnet* v. *Coronado Oil & Gas Company*, decided April 11, 1932. These decisions are not controlling here. The nature and purpose of copyrights place them in a distinct category and we are unable to find any basis for the supposition that a nondiscriminatory tax on royalties hampers in the slightest degree the execution of the policy of the copyright statute.

We agree, however, with the contention that in this aspect royalties from copyrights stand in the same position as royalties from the use of patent rights, and what we have said as to the purposes of the Government in relation to copyrights applies as well, *mutatis mutandis*, to patents which are granted under the same constitutional authority to promote the progress of science and useful arts. The affirmance of the judgment in the instant case cannot be reconciled with the decision in *Long* v. *Rockwood*, 277 U. S. 142, upon which appellant relies, and in view of the conclusions now reached upon a reexamination of the question, that case is definitely overruled.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.